

Issue: Group III Written Notice with Termination (misuse of State property); Hearing Date: 01/10/13; Decision Issued: 01/14/13; Agency: Virginia State University; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9995; Outcome: No Relief – Agency Upheld.

# ***COMMONWEALTH of VIRGINIA***

***Department of Human Resource Management***

***Office of Employment Dispute Resolution***

## **DIVISION OF HEARINGS**

### **DECISION OF HEARING OFFICER**

In the matter of: Case No. 9995

Hearing Date: January 10, 2013

Decision Issued: January 14, 2013

### **PROCEDURAL HISTORY**

Grievant was a communications officer for Virginia State University (“the Agency”). On October 22, 2012, the Grievant was charged with a Group III Written Notice for improperly accessing a criminal background check on an individual for non-work reasons on September 26, 2012. The discipline was job termination.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action, and the grievance qualified for a hearing. On December 10, 2012, the Office of Employment Dispute Resolution, Department of Human Resource Management, (“EDR”) appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for January 10, 2013, on which date the grievance hearing was held, at the Agency’s facility.

The Agency submitted documents for exhibits that were accepted into the grievance record, without objection by the Grievant, and they will be referred to as Agency’s Exhibits. The hearing officer has carefully considered all evidence presented.

### **APPEARANCES**

Representative for Agency  
Advocate for Agency  
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?

Through her grievance filings, the Grievant requested rescission of the Group III Written Notice, reinstatement, and back pay.

### BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act 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 to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent 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 employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group III Offenses to include acts of

misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws. Agency Exh. 4.

The Virginia Criminal Information Network Operating Manual, at p. I-5, states:

The VCIN system shall only be used by authorized criminal justice agencies to transmit and receive criminal justice information for criminal justice purposes.

Agency Exh. 5. Similarly, Departmental Instruction 502, *Alcohol and Drug Program*, provides:

Any employee in a safety sensitive position shall notify his supervisor before beginning work when he is taking any medication or drug (prescription or non-prescription) if the prescription or packaging indicates that it may interfere with the safe and efficient performance of his duties, or the operation of a vehicle or equipment.

Agency Exh. 5.

Va. Code § 9.1-136 sets forth a criminal penalty for the conduct alleged in this Written Notice:

Any person who willfully and intentionally requests, obtains, or seeks to obtain criminal history record information under false pretenses, or who willfully and intentionally disseminates or seeks to disseminate criminal history record information to any agency or person in violation of this article or Chapter 23 (§ 19.2-387 et seq.) of Title 19.2, shall be guilty of a Class 2 misdemeanor.

There are also civil remedies available for violations. Va. Code § 9.1-135.

The Agency's Police & Public Safety Manual requires all employees to obey the applicable laws. The manual specifically prohibits employees from providing false information in the line of duty. Agency Exh. 6.

Va. Code § 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 § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), 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.”

### The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a communications officer, with no prior disciplinary actions entered into the grievance record.

The current written notice charged:

On September 26, 2012 [the Grievant], while working as a D.P.P.S. dispatcher, improperly and illegally accessed the VA Criminal Information Network (VCIN) system and ran a criminal background check on an individual with whom she has a personal relationship. She made entry in the department log that the check was requested by another Officer, which she knew to be false. [The Grievant] admitted to her supervisor, [ ], that she ran the VCIN check to determine if her personal friend was married. When [the Grievant] ran the VCIN check she violated, the Code of Virginia 9.1-136, a class 2 misdemeanor.

In addition, [the Grievant] violated D.P.P.S. Policy and Procedure, Rules of Conduct, A-4.0, V.B.-6, Obedience to laws and orders, falsification of records and documents and DHRM Standards of Conduct Policy 1.60 by unauthorized use or misuse of state property or records.

Agency Exh 1.

The Agency’s chief of police testified that the breach of the VCIN system is a serious offense that undermines the integrity of the institution and actually jeopardizes the Agency’s participation in the VCIN for unsecured and unauthorized use. The VCIN system is a vital tool for any police force. The violation put the Agency at risk for losing access to the VCIN, and for potential liability for the misuse of criminal background checks. The police chief testified that he has never had to confront another instance of this kind of offense at the Agency.

The grievant’s supervisor testified that the Grievant admitted the improper criminal background check, stating several reasons for her offense, including that the Grievant felt her friend was “controlling.”

The Grievant, while appearing, elected not to testify. She asserted, through her questioning of Agency witnesses, that she never stated she ran the criminal check seeking marital

status, as that is not what a criminal background check would show. The Grievant, while admitting to the conduct, asserted that job termination was too severe a sanction for the offense.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. The Grievant's admission satisfies the Agency's burden of proving that the Grievant requested the unauthorized criminal background check.

Based on the evidence presented, I conclude that the Agency has met its burden of proof of the offense and level of discipline. The offense, ostensibly a criminal act, rises to the most severe level of offenses, Group III, for which the normal discipline is job termination.

#### Mitigation

The Agency expressed its inability to mitigate the discipline to less than termination because of the severity of the Grievant's conduct in falsifying the records to request the unauthorized criminal background check. As referenced above, this conduct might be considered a Class 2 misdemeanor. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness. The Agency has proved (i) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

Termination is the normal disciplinary action for a Group III offense unless mitigation weighs in favor of a reduction of discipline. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). 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.

Under the *Rules for Conducting Grievance Hearings*, an employee's length of service and otherwise satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action. Here, the Grievant has not shown that mitigating factors render the job termination outside the bounds of reason.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. In this case, the Agency's action of imposing discipline of termination is within the limits of reasonableness. The Hearing Officer finds no evidence that warrants any mitigation to reduce or rescind the disciplinary action.

### DECISION

For the reasons stated herein, I uphold the Agency's Group III discipline and termination.

### 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>1</sup>

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

A handwritten signature in blue ink, appearing to read "Cecil H. Creasey, Jr.", written over a horizontal line.

Cecil H. Creasey, Jr.  
Hearing Officer

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