

Issue: Group III Written Notice with Termination (actions unbecoming a Corrections Officer); Hearing Date: 06/16/14; Decision Issued: 06/18/14; Agency: DOC; AHO: William S. Davidson, Esq.; Case No.10358; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA  
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT  
DIVISION OF HEARINGS  
DECISION OF HEARING OFFICER  
In Re: Case No: 10358

Hearing Date: June 16, 2014  
Decision Issued: June 18, 2014

**PROCEDURAL HISTORY**

The Grievant was issued a Group III Written Notice on March 13, 2014, for:

“Actions Unbecoming a Corrections Officer” [Grievant] appeared in Greensville General District Court on March 3, 2014. He was found guilty of DUI charge with a sentence of 12 months in jail with all but 20 days suspended. His privilege to drive in Virginia was suspended for 12 months. For this reason, the written notice is being issued.<sup>1</sup>

Pursuant to this Written Notice, the Grievant was terminated.<sup>2</sup> The Grievant timely filed a grievance to challenge the Agency’s actions on April 8, 2014.<sup>3</sup> On May 8, 2014, this appeal was assigned to a Hearing Officer. On June 16, 2014, a hearing was held at the Agency’s location.

**APPEARANCES**

Advocate for Agency  
Party Representative for Agency  
[Grievant was not present at hearing]  
Witnesses

**ISSUE**

Did the Grievant violate the terms of Operating Procedure 135.1?

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<sup>1</sup> Agency Exhibit 1, Tab 1, Page 1

<sup>2</sup> Agency Exhibit 1, Tab 1, Page 1

<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> However, proof must go beyond conjecture.<sup>6</sup> In other words, there must be more than a possibility or a mere speculation.<sup>7</sup>

## **FINDINGS OF FACT**

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

The Agency provided me with a notebook containing 8 tabs and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant did not file any documentary evidence with me.

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<sup>4</sup> See Va. Code § 2.2-3004(B)

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

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

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

Inasmuch as the Grievant did not offer any documentary evidence or appear at his hearing, I have no evidence whatsoever from the Grievant.

Operating Procedure 135.1 Section IV(J)(1), states as follows:

Removals Due to Circumstances That Prevent an Employee From Performing the Job

An employee unable to meet the working conditions of employment, due to circumstances such as those listed below may be removed. Such circumstances include, but are not limited to:

- a. Loss of driver's license that is required for the job
- b. Incarceration in excess of one week...<sup>8</sup>

Further, Operating Procedure 135.1 Section V(A)(3), states as follows:

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, 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 other mitigating factors including prior discipline, length of service and performance...

...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, the public and its perception of the DOC...<sup>9</sup>

The Agency introduced evidence regarding the Grievant's driving offenses.<sup>10</sup>

In the total absence of any testimony or documentary evidence from the Grievant, I find that the Agency has borne its burden of proof regarding this Group III Written Notice.

**MITIGATION**

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<sup>8</sup> Agency Exhibit 1, Tab 8, Page 8

<sup>9</sup> Agency Exhibit 1, Tab 8, Page 10

<sup>10</sup> Agency Exhibit 1, Tab 3, Pages 1-2; Tab 4, Pages 1-3; Tab 5, Pages 1-2; Tab 6, Pages

*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.

### **DECISION**

I find that the Agency has borne its burden of proof in this matter and that the issuance of a Group III Written Notice with termination was appropriate.

### **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 14<sup>th</sup> Street, 12<sup>th</sup> 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 14<sup>th</sup> Street, 12<sup>th</sup> 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.<sup>11</sup> 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>12</sup>

[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]

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William S. Davidson  
Hearing Officer

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<sup>11</sup>An 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).

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