

Issue: Group III Written Notice with Termination (failure to have valid CDL); Hearing Date: 09/11/13; Decision Issued: 09/26/13; Agency: VDOT; AHO: Jane E. Schroeder, Esq.; Case No. 10154; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA

*Department of Human Resource Management
Office of Employment Dispute Resolution*

DECISION OF THE HEARING OFFICER

In the matter of Case Number 10154

Case Heard: September 11, 2013

Decision Issued: September 26, 2013

PROCEDURAL HISTORY

The Grievant was employed as a Transportation Operator II at the agency. On June 25, 2013, the Grievant received a Group III Written Notice for loss of a Commercial Driver's License that is required for the performance of the job, and his employment was terminated. The Grievant initiated the Employee Grievance Procedure on July 23, 2013 by completing Grievance Form A - Dismissal Grievance. The Grievant is requesting reinstatement to his position as a Transportation Operator II. The grievance was subsequently qualified for hearing. On August 12, 2013, the hearing officer was assigned to hear the case.

A telephonic pre-hearing conference was held on August 15, 2013. The hearing was on September 11, 2013. Six witnesses, including the Grievant, testified. The Grievant's exhibits, identified as Grievant Exhibits 1-6 were entered into evidence without objection. The Agency's exhibits are identified as Agency Exhibits 1-20. The Grievant's attorney objected to Exhibits 8, 9, 10, 11, and 19. The objections to Exhibits 10 and 11 were withdrawn. The objections to Exhibits 8, 9 and 19 were overruled. Agency's Exhibits 1-20 were then entered into evidence. Certified copies of Exhibits 15 and 19 were presented at the hearing and entered evidence without objection. The five-hour hearing was recorded on a digital recorder and stored on a compact disk.

APPEARANCES

Grievant

Counsel for Grievant

Counsel for Agency

Human Resources Manager for Agency

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| Witnesses for Agency: | #1 | Grievant |
| | #2 | Human Resources Manager for Agency |
| | #3 | Department of Motor Vehicles Custodian of Records |
| | #4 | Human Resources Consultant Supervisor for Agency |
| | #5 | Maintenance Superintendent for Agency |
| | #6 | Residency Administrator for Agency |

Witness for Grievant: Grievant

ISSUE

Whether to sustain, modify or revoke the Group III Written Notice and termination issued to the Grievant on June 25, 2013, for loss of a driver's license that is required for the performance of the job. The Agency must prove that it is more likely than not that:

1. The Grievant knew or should have known that he was driving without a valid Commercial Driver's License from November, 2010 until June, 2013, and
2. The Grievant's act of driving while on the job without a valid Commercial Driver's License from November 2010 until June 2013 constitutes misconduct.

BURDEN OF PROOF

In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and the burden of proof is on the Agency to show by a preponderance of the evidence that its action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. (Grievance Procedure Manual). This case is a disciplinary action. The burden of proof is on the agency.

FINDINGS OF FACT

1. The Grievant worked as Transportation Operator II at the agency since September, 2008. The Grievant signed an acceptance letter for this job in September 2008. In this acceptance letter, the Grievant was informed that one of the requirements of the job was to have and maintain a valid Virginia Commercial Driver License.¹
2. In the Agency's Employee Work Profile, signed by the Grievant on December 10, 2012, Part II, #22 states, "Position requires a valid Commercial Driver's License with appropriate endorsements to be maintained as a condition of employment."²
3. It was not disputed that the Grievant had a Commercial Driver's License (CDL) prior to September, 2010. On September 13, 2010, the Grievant was given a summons by a police officer for an expired inspection sticker. The summons was for a court date of October 22, 2010. The back of the summons outlined the option to prepay the fine and costs of \$91.00.³
4. On November 1, 2010, Fauquier General District court mailed a notice to the Grievant that the check to pay the fine and costs that the Grievant had given the court on October 20, 2010 had been returned by the bank. The letter notifies the Grievant if he did not pay

¹ Testimony of Grievant; Agency Exhibit 5

² Agency Exhibit 4

³ Agency Exhibit 15, pp. 1-2

the money owed by November 12, 2010, his driver's license would be suspended on that date.⁴

5. On November 15, 2010, the Department of Motor Vehicles mailed to the Grievant at his home address a NOTICE OF COURT SUSPENSION. In this notice, the Grievant was notified that the court had suspended his privilege to drive on November 12, 2010 for failure to pay fine and costs. Instructions to reinstate the driver's license were outlined in the letter. This included paying the fines and costs and furnishing the DMV with the court receipt that the fees owed have been paid and to provide proof to the DMV proof of legal presence in the United States.⁵
6. On November 16, 2010, (four days past the deadline) a receipt from the Fauquier General District Court shows that the Grievant's wife paid the fine and costs by credit card on that day. Included in the Grievant's exhibits is the defendant's copy of the Driver's License Reinstatement Form that shows that the fine and costs of \$111.00 were paid on 11/16/10.
7. The Driver's License Reinstatement Form is a notice to the Division of Motor Vehicles from the court that the Defendant (Grievant) had paid the fines and costs. In the middle of the page, it gives instructions to the Defendant as follows:

INSTRUCTIONS

TO HAVE YOUR OPERATING PRIVILEGES REINSTATED, SUBJECT TO ANY OTHER APPLICABLE SUSPENSIONS OR REVOCATIONS, PRESENT THIS FORM, WITH PROOF THAT YOU ARE LEGALLY PRESENT IN THE UNITED STATES, AT ANY VIRGINIA DMV OFFICE AND COMPLY WITH ALL OTHER DMV REGULATIONS. FOR MORE INFORMATION, SEE WWW.DMVNOW.COM.⁶

8. The Grievant testified that he did not know that the check paid on October 20, 2010 had been returned by the court. He testified that he did not see the letter sent to him by the court that his driver's license would be suspended if he did not pay the fine and costs by November 12, 2010, his driver's license would be suspended. He testified that he did not see the letter the DMV sent him on November 15, 2010 that his driver's license was suspended. He testified that he was unaware that his wife had paid the fines and cost on November 16, 2010. He further testified that his wife opens the mail and pays the bills, and he was unaware that his license was suspended until he was told in June, 2013.⁷
9. Even though it has not been shown that the Grievant had actual knowledge that his license was suspended, it is a finding of fact by this Hearing Officer that the preponderance of the evidence shows that the notices from the court and the DMV about

⁴ Agency Exhibit 15, p. 1

⁵ Agency Exhibit 19, p. 3,4

⁶ Grievant Exhibit 3

⁷ Testimony of the Grievant

the Grievant's suspended CDL were mailed to his home address. The evidence does show that the wife acted on a notice by paying the fines and costs on November 16, 2010.

10. In June, 2013, the Human Resources (HR) Manager at the Agency was alerted by the Grievant's supervisor that the Grievant was not coming to work regularly. There was concern that there was a medical issue that may impact the Grievant's Commercial Driver's License (CDL). The HR Manager checked the Grievant's DMV record. The DMV record of the Grievant showed that his CDL was suspended in 2010 and had not been reinstated. The HR Manager asked the HR Consultant Supervisor to handle the case.⁸
11. On June 17, 2013, the HR Consultant Supervisor contacted the Residency Administrator and advised him that the Grievant's CDL was suspended and the Grievant should not be driving.⁹
12. The Residency Supervisor alerted the Grievant's immediate supervisor, the Maintenance Superintendent, to tell him that the Grievant was not to operate any equipment until further notice, and that the Maintenance Superintendent and the Grievant were to attend a meeting at the district officer with HR personnel at 7:00 a.m. on June 19, 2013.¹⁰
13. Four meetings were held with the Grievant. The first meeting was held on June 19, 2013 at 7:00 a.m. In attendance were the HR Manager, the Maintenance Superintendent and the Grievant. At the meeting the HR Manager told the Grievant that she had reason to believe that he had no CDL. She told him that he was on administrative leave until more information could be obtained. He was to report back at 4:00 p.m. The HR Manager testified that the Grievant did not confirm nor deny that he had no CDL.¹¹
14. The second meeting was held on June 19, 2013 at 4:00 p.m. In attendance were the Assistant Resident Administrator, the HR Consultant Supervisor, the Maintenance Superintendent and the Grievant. At the meeting the Maintenance Superintendent read aloud a Memorandum he wrote to the Grievant, and handed the Memorandum to the Grievant. The Memorandum, with a subject heading: "Proposed Disciplinary Action," informed the Grievant that the agency was considering disciplinary action against the grievant, including a Group III Written Notice and termination of his employment, for his failure to maintain a CDL and for not informing management of the loss of his CDL. The Grievant was given 24 hours to provide a written response with any information the Grievant wanted the agency to consider.¹²
15. On June 20, 2013, the Grievant went to the court and then to the DMV. The court records indicated that fines and costs had been paid on November 16, 2010. The DMV provided the Grievant with a Compliance Summary that stated that the Grievant's driver's license

⁸ Testimony of Human Resource Manager, Agency Exhibit 19, p. 1-2

⁹ Testimony of HR Consultant Supervisor

¹⁰ Testimony of Residency Administrator

¹¹ Testimony of HR Manager

¹² Testimony of Maintenance Superintendent, Agency Exhibit 1, p.24-25

was suspended on November 12, 2010. To reinstate the license, the Grievant had to pay a reinstatement fee of \$145.00 and to present proof (such as a birth certificate) that he was legally present in the United States. The Grievant went online and ordered a copy of his birth certificate from the VA Department of Health to be sent via an express service.¹³

16. The third meeting with the Grievant was held on June 20, 2013, at 4:00 p.m. In attendance were the Assistant Resident Administrator, the HR Consultant Supervisor, the Maintenance Superintendent and the Grievant. At that time, the Grievant provided his written response to the Memorandum. In his response, the Grievant explained that he had been to the court and to the DMV and that he was waiting the copy of the birth certificate that he had ordered. He attached the documents from the court, DMV, and the Virginia Department of Health.¹⁴ The Grievant was informed that the letter would be reviewed and that the agency would contact him.
17. On June 24, 2013, the Grievant received his birth certificate. He went to the DMV and his CDL was restored. He called the Maintenance Superintendent that afternoon and notified him that the CDL was restored.¹⁵
18. On June 25, 2013, the fourth meeting with the Grievant was held. Attending the meeting were the Resident Administrator, the HR Consultant Supervisor, the Maintenance Superintendent and the Grievant. The Grievant was given the Group III Written Notice, a letter of termination and information on the grievance procedure.¹⁶
19. On July 23, 2013, the Grievant filed Grievance Form A and attachments with Office of Employment Dispute Resolution.¹⁷

APPLICABLE LAW AND OPINION

The Virginia Personnel Act, VA Code ' 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions 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 government interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653,656 (1989).

The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

Policy Number 1.60: Standards of Conduct.

¹³ Testimony of Grievant, Agency Exhibit 1, p. 18, 19, 23

¹⁴ Testimony of HR Consultant Supervisor, Agency Exhibit 1, p. 17

¹⁵ Grievant Exhibits 5 and 6

¹⁶ Testimony of HR Consultant Supervisor and Residency Administrator, Agency Exhibit 1, p. 26 and Exhibit 2

¹⁷ Grievant Exhibit 1

Policy 1.60: Standards of Conduct provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section B.2.c. provides that Group III offenses include acts of misconduct of such a severe nature that a first occurrence would normally 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.

In the present case, the Grievant was given a Group III Written Notice for driving without a Commercial Driver's License that is required for the performance of the job. The Grievant's employment was terminated. The Grievant filed Grievance Form A - Dismissal Grievance with the Office of Employment Dispute Resolution, and a hearing was scheduled and conducted to determine whether the Group III Written Notice should be upheld.

The issue in this case is whether to sustain, modify or revoke the Group III Written Notice and termination issued to the Grievant on June 25, 2013, for loss of a driver's license that is required for the performance of the job. The Agency must prove that it is more likely than not that:

1. The Grievant knew or should have known that he was driving without a valid Commercial Driver's License from November, 2010 until June, 2013, and
2. The Grievant's act of driving while on the job without a valid Commercial Driver's License from November 2010 until June 2013 constitutes misconduct.

In the Rules for Conducting Grievance Hearings, Section VI., Scope of Relief, B. Disciplinary Actions, section A Framework for Determining Whether Discipline was Warranted and Appropriate states as follows:

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with the law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).¹⁸

¹⁸Rules for Conducting Grievance Hearings, VI.B1., Effective Date 7/1/2012.

Using this framework, this Hearing Officer will analyze this case.

(i) Whether the employee engaged in the behavior described in the Written Notice

In this case, the Grievant drove from November 12, 2010 until June 24, 2013 without a valid CDL that is required for his employment at the agency. The Grievant knew he had a traffic citation for an expired sticker on September 13, 2010. He knew that the fine for the ticket had been paid to the court. He claims that he did not know that the check was returned by the court for insufficient funds, that the court and DMV notified him in separate letters sent to his home that his driver's license was suspended, or that his wife paid his fines after the date of his suspension.

In §46.2-395 of the Code of Virginia, clerks of the courts are required send a written notice to a person whose driver's license is being suspended for failure to pay fines and costs. Under §46.2-395.C, the notice shall be provided to the person at the time of trial or shall be mailed by first-class mail to the address certified on the summons as the person's current mailing address. No other notice shall be required.¹⁹

In this case, the notice from the court was provided to the Grievant. The Grievant even included a copy of the letter as Grievant's Exhibit 3. The DMV also sent a letter to the Grievant that his license was suspended. The day after that letter was received at the Grievant's home, his wife paid his fines and costs at the court. Although I do not find that the Grievant actually saw the notices sent to his home, the notices provided by the court and the DMV are legally sufficient notices to the Grievant that his license was suspended. The Grievant knew or should have known that his license was suspended in November, 2010.

(ii) Whether the behavior constituted misconduct

The Commercial Motor Vehicle Safety Act, enacted into federal law in 1986, requires the states to ensure drivers of large trucks and buses are qualified to operate those vehicles. The Federal Motor Carrier Safety Administration of the United State Department of Transportation has set requirements which include the requirement that the driver is to have a Commercial Driver's License (CDL).²⁰

The Commonwealth of Virginia has authorized the Virginia Department of Motor Vehicles to establish procedures to enable the state to issue CDL's and impose licensing sanctions consistent with the federal Commercial Motor Vehicle Safety Act and subsequent federal regulations. Under Virginia law, a person driving a commercial motor vehicle must maintain a CDL.²¹

In the acceptance letter of September 18, 2008 for his job, the Grievant was informed that one of the requirements of the job was to have and maintain a valid Virginia Commercial Driver License The Grievant also signed on December 10, 2012 the latest Employee Work Profile for

¹⁹ Code of Virginia §46.2-395

²⁰ Agency Exhibit 7, p. 1

²¹ Code of Virginia §46.2-341.5 and §46.2-341.7

the Grievant's position at the agency. In this document, the requirement to maintain a valid CDL is listed.

To drive a commercial vehicle motor without a valid CDL is clearly a violation of state and federal law. Under the standards of conduct, illegal conduct is an offense that is misconduct. To drive a commercial motor vehicle for two and a half years without a valid CDL, as the Grievant did, constitutes misconduct.

(iii) Whether the disciplinary action taken by the agency was consistent with the law and policy

The Grievant was given a Written Notice of a Group III Offense. The Grievant's employment was terminated. This level of discipline is appropriate in this case due to the illegal conduct of driving a commercial motor vehicle with a valid CDL. This Hearing Officer finds that the agency's disciplinary action is consistent with law and policy.

Mitigating Circumstances

Because the Grievant's employment was terminated, the hearing officer must consider evidence of mitigation or aggravation of the offense charged by the agency. The grievant offered for mitigation the fact that he was an employee of the agency for twenty-two years, had a good performance record, and that the Grievant restored his CDL as soon as he knew it was suspended. According to the Rules for Conducting Grievance Hearings, AA hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. A hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness.²²

The agency knew of these mitigating factors when giving the Written Notice. In Section IV of the Written Notice, there is a written record that the mitigating factors of the Grievant's performance and tenure were considered.²³ The testimony of the Agency's witnesses demonstrated that, despite the Grievant's performance and tenure at the Agency, driving without a CDL at the Agency for more than two years could not be tolerated. After review of the mitigating circumstances, this Hearing Officer finds that the agency's discipline of imposing a Group III Written Notice and termination does not exceed the limits of reasonableness.

DECISION

The Grievant's Group III Written Notice is upheld. The Grievant's termination of employment is upheld.

²² Rules for Conducting Grievance Hearings, p. 17

²³ Agency Exhibit 2

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 14th St, 12th 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 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 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.²⁴

²⁴Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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].

September 26, 2013

Jane E. Schroeder, Hearing Officer