

Issue: Group III Written Notice with Termination (violation of drug/alcohol policy);  
Hearing Date: 07/09/15; Decision Issued: 07/10/15; Agency: ABC; AHO: Carl  
Wilson Schmidt, Esq.; Case No. 10629; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10629**

Hearing Date: July 9, 2015  
Decision Issued: July 10, 2015

#### **PROCEDURAL HISTORY**

On May 1, 2015, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of DHRM policy 1.05, Alcohol and Other Drugs.

On May 13, 2015, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On June 8, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 9, 2015, 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. 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 Alcoholic Beverage Control employed Grievant as a Retail Manager I at one of its facilities. She began working for the Agency in 2001. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was convicted twice for driving under the influence prior to her employment with the Agency. At the time of Grievant's hiring, the Agency's alcohol policy did not address behavior arising outside of work hours. The Agency later amended its policy to consider behavior arising during work hours and outside of work hours.

On April 15, 2015, Grievant was convicted of driving under the influence of alcohol contrary to *Va. Code* § 18.2-266. She was also convicted under *Va. Code* § 46.2-894 for failure to stop following an accident with damage in excess of \$1,000.

### **CONCLUSIONS OF POLICY**

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."<sup>1</sup> Group II offenses "include acts of misconduct of a more serious

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<sup>1</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Under the Agency’s Alcohol & Other Drugs Policy, a “criminal conviction for a ... [v]iolation of any alcohol beverage control law or law that governs driving while intoxicated, based on conduct occurring in or outside of the workplace” is contrary to the policy. Section IV of the policy provides:

- A. Any employee, either classified or wage, who commits any violation, as described in the “Violations” section of this policy, shall be subject to the full range of disciplinary actions, including discharge ....
  - 3. Based on the mission of the agency, alcohol-related convictions specifically have a negative impact on the agency and as such shall result in disciplinary actions ranging from a Group I Written Notice ... to a Group III Written Notice (classified employees only) and termination (all employees). The level of severity shall be determined based on the type of violation (i.e. DUI, purchasing alcohol for a minor, etc.)

On April 15, 2015, Grievant was convicted of driving under the influence of alcohol. Grievant’s behavior was contrary to the Agency’s Alcohol & Other Drug Policy. Under this policy, the Agency had discretion to issue Grievant a Group III Written Notice with removal. The Agency’s decision to issue Grievant a Group III Written Notice with removal must be upheld.

Grievant argued that her Supervisor initially told her she would be able to keep her job. She argued that the Agency’s prior counseling contained errors. Speculation by a supervisor regarding the possible outcome of certain behavior does not form a basis to bind an agency to that speculation. In addition, the Agency did not base its disciplinary action on Grievant having prior counseling. Whether the prior counseling was correct has no bearing on the outcome of this case.

Grievant questioned why the Agency would ignore her two convictions prior to hiring her but not ignore her recent conviction. An Agency manager testified that the Agency changed its Alcohol & Other Drugs policy after Grievant’s employment to consider behavior occurring on and outside of work hours. Another manager testified that if Grievant’s application had been received today showing two DUI conviction, he would not have hired her.

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>2</sup> Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any

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<sup>2</sup> Va. Code § 2.2-3005.

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 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 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](mailto: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>3</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].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>3</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.