

Issue: Separation from State (unable to meet work conditions – loss of CDL license);
Hearing Date: 09/08/15; Decision Issued: 09/25/15; Agency: JMU; AHO:
John R. Hooe, III, Esq.; Case No. 10668; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS
DECISION OF HEARING OFFICER**

In the matter of: Case No. 10668

Hearing Date: September 8, 2015
Decision Issued: September 25, 2015

PRELIMINARY MATTERS

Upon being appointed as the Hearing Officer in this matter, effective Monday, August 17, 2015, the Hearing Officer arranged a pre-hearing telephone conference which was conducted on Tuesday, August 18, 2015 at 2:00 p.m. The telephone pre-hearing conference was conducted with the Grievant and Agency representative. At that time, the grievance hearing was scheduled to be conducted on Tuesday, September 8, 2015 beginning at 1:00 p.m.

APPEARANCES

Grievant
Representative for Agency
Two witnesses for the Agency

ISSUES

1. Did the Grievant's conviction of driving under the influence of alcohol prevent him from meeting the requirements of his job?
2. If so, was such inability to meet the requirements of his job a violation of Policy 1317, Standards of Conduct and Performance for Classified Employees?

3. Was termination from employment an appropriate action by the Agency?
4. Was the Agency's action in terminating Grievant's employment inconsistent with the Agency's treatment of other Agency employees similarly situated?

EXHIBITS

The Agency Exhibits admitted into evidence are contained in a single file with the following contents:

- Exhibit A - Memorandum dated July 10, 2015, Due Process Notification with attachments
- Exhibit B - Letter of termination dated July 13, 2015
- Exhibit C - Policy 1110 Alcohol and Other Drugs
- Exhibit D - Policy 1317 Standards of Conduct and Performance for Classified Employees
- Exhibit E - New Employee Orientation Program verification dated December 22, 2005
- Exhibit F - Position duties, responsibilities and qualifications
- Exhibit G - Grievance Form A with four page attachment

The Grievant did not offer any exhibits.

FINDINGS OF FACT

The Grievant filed a timely appeal from his termination from employment effective July 13, 2015.

Exhibit A included a memo from the Grievant's supervisor that it was the supervisor's intent to terminate the Grievant's employment for two reasons: First, because the restricted driving license issued by the court in relation to Grievant's conviction of driving under the influence of alcohol would prevent the Grievant from operating any of the Agency fleet vehicles and; Second, the driving under the influence conviction resulted in the Grievant not having a commercial driver's license, class A, a requirement of his job.

Exhibit A also included a copy of the restricted driver's license order which expressly permitted, solely in the course of his employment, the Grievant to operate a motor vehicle owned or provided by the employer without installation of an ignition interlock but not a commercial motor vehicle.

Exhibit C, Policy 1110 prohibits the criminal conviction for driving while intoxicated. In addition, Exhibit D, Policy 1317 indicates the employee may be removed due to a loss of driver's license required for the job.

Exhibit F, the Grievant's position description at page five indicates that a requirement of his position is a "valid driver's license, Class A CDL, Virginia State Inspection License".

The Grievant's supervisor testified that although an employee in Grievant's position is not often called upon to drive a commercial vehicle, the need can and does arise.

The Grievant testified that another employee of the Agency, a manager of housekeeping, was convicted of a driving under the influence charge and was not fired. The Grievant however did not allege that the other employee needed to have a CDL as part of the employee's job description. The Grievant further testified that another Agency employee who is the Grievant's co-worker never received his state inspection license and yet was never terminated for failing to gain the required license.

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 (A) 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.

Standards of Conduct, Policy: 1317 state as follows:

An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section. Reasons include:

- failure to obtain license or certification required for the job;

DECISION

The disciplinary action of the Agency is upheld.

The Agency proved by a preponderance of the evidence that the Grievant lost his CDL license due to his conviction of driving under the influence. Holding a CDL license is a requirement of the Grievant's job. The Grievant did not show that other Agency employees similarly situated were treated in a different manner.

APPEAL RIGHTS

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. "Received by" means delivered to, not merely post-marked or placed in the hands of a delivery service.

Requesting Administrative Review:

1. **A challenge that the hearing decision is inconsistent** with state or agency policy is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. The director's

authority is limited to ordering the Hearing Officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-371-7401 or emailed.

2. A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings), as well as a request to present newly discovered evidence, is made to EDR . This request must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance. EDR's authority is limited to ordering the Hearing Officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12th Floor, Richmond, Virginia 23219 or fax to 804-786-0111 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar days of the conclusion of any other administrative reviews.

Final Hearing Decision. A Hearing Officer's original decision becomes a final hearing decision, with no further possibility of administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have ben decided and, if ordered by EDR or DHRM, the Hearing Officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Once an original hearing decision becomes final, either party may seek review by the Circuit Court on the ground that the final hearing decision is contradictory to law. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named

as a party in such an appeal.

An employee does not need EDR's approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10 calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may make its request by email or fax. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency's request.

A notice of appeal must be filed with the Clerk of the Circuit Court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

John R. Hooe, III
Hearing Officer