

Issue: Group III Written Notice with Termination (criminal conviction); Hearing Date: 09/09/16; Decision Issued: 09/14/16; Agency: VEC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10852; 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: 10852

Hearing Date: September 9, 2016
Decision Issued: September 14, 2016

PROCEDURAL HISTORY

On July 18, 2016, Grievant was issued a Group III Written Notice of disciplinary action with removal for criminal conviction.

On July 19, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On August 1, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 9, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Virginia Employment Commission employed Grievant as Trainer & Instructor II. The purpose of her position was:

Assists Adjudication managers in the development of adjudication training that provides standardized training and performance objectives for newly hired hearings officers as prerequisite for deputization. Conducts adjudication training statewide, by webinar and in person, based on agency assessment needs, DOL requirements and performance results. Assists Adjudication Center managers in developing and conducting Unemployment Insurance functional training for Agency staff involved in UC claims processing and administration. Assists Chief of Benefits in the review of Call Center training programs and other field office training programs affecting Unemployment Insurance Assists. Tax manager in development of training for Tax staff.¹

She began working for the Agency in 2009. Grievant had no prior active disciplinary action.

The Agency's practice was to conduct criminal background checks of employees who were selected to fill available positions. If the position being filled was a "financially sensitive" position, then the Agency also obtained a credit report on the applicant.

¹ Agency Exhibit 6.

Grievant held a Financially Sensitive position.² When she was hired into her current position, the Agency completed a criminal history and credit report on Grievant. Grievant had access to the Agency's Virginia Automated Benefits System that contained claimant information and wage information. This system allowed processing of unemployment insurance payments. Grievant also had access to the Virginia Unemployment Insurance System which administers the Agency's Unemployment Insurance Tax program. The UI tax program contains employer account information, employee personal identifying information and wage information. Grievant used these systems as part of her training duties. An employee with access to these systems could easily engage in identity theft.

On August 10, 2013, Grievant was arrested and charged with Grand Larceny for goods valued at \$200 or more. Grievant retained an Attorney. She appeared before the local General District Court on October 23, 2013 with her Attorney. She was offered a plea agreement by the local Commonwealth's Attorney to be convicted of a Petit Larceny instead of Grand Larceny. Grievant accepted the agreement and informed the Court of her plea. Grievant received a jail sentence of 12 months with 12 months suspended for a period of three years conditioned upon being of good behavior. She was ordered to perform 150 hours of community service and banned from the Department Store. She was obligated to pay a fine and costs of \$82.00. Grievant did not notify the Agency of her conviction.

On April 25, 2016, the Agency notified employees of a position opening for an Unemployment Compensation Supervisor. Employees were notified that the Agency conducted criminal background checks for all open positions and credit reports for financially sensitive positions.

On May 6, 2016, Grievant applied for the position of Unemployment Compensation Supervisor. This was a financially sensitive position.

Grievant knew that the Agency would conduct a background check and was concerned how the Agency would treat her application upon discovery of her conviction for Petit Larceny. Grievant encountered the HR Analyst in a hallway at the building where Grievant worked. Grievant said she had applied for the position of Unemployment Compensation Supervisor and asked the HR Analyst who was the person in human resources who handled criminal background checks. The HR Analyst said she was the person in the Human Resource Department who handled criminal background checks. The HR Analyst told Grievant that she would be "ok."³

² Grievant's 2015 Employee Work Profile shows her position is not Financially Sensitive. This appears to be an error. Grievant's prior EWP's showed she was holding a Financially Sensitive position. She was responsible for accessing the Agency's computer systems that contained confidential financial and personally identifying information.

³ The HR Analyst denied making several key statements to Grievant about criminal background checks. Grievant's description of the encounter is more believable.

Grievant was the successful candidate for the Unemployment Compensation Supervisor position. The Agency conducted a criminal background and discovered Grievant's conviction for Petit Larceny. Agency managers sought an explanation from Grievant. On July 7, 2016, Grievant withdrew her application for employment for the position of Unemployment Compensation Supervisor.

Agency managers considered Grievant's explanation, her satisfactory work performance, the risk posed to the Agency, and how the Agency treated other similarly situated employees. The Agency decided to issue Grievant a Group III Written Notice with removal. The Agency treated Grievant the same way it treated similarly situated employees. These other employees were also removed from employment.

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."⁴ Group II offenses "include acts of misconduct of a more serious 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."

Group III offenses include, "criminal convictions for illegal conduct occurring on or off the job that clearly are related to job performance"⁵ Grievant was convicted of Petit Larceny. Her conviction is clearly related to her job performance because her position is financially sensitive. Larceny is a crime of theft and involves moral turpitude. By having admitted to larceny, Grievant placed the Agency at greater risk of theft than from an employee without a criminal conviction based on the assumption that character does not change over time. Grievant held a position where she could easily engage in identify theft. The Agency did not wish to take that risk. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argued that the Agency could structure her job so that she did not have to use data reflecting actual claims filed with the Agency. Although the Agency admitted it could do so, it did not wish to do so. No policy requires the Agency to change an employee's job duties to account for a criminal conviction.

⁴ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁵ Attachment A, DHRM Policy 1.60.

Grievant argued that if the HR Analyst had told her that a criminal conviction may result in losing her job, she would have withdrawn her application before she became the successful applicant and a background check was conducted. The HR Analyst was not involved in the decision making process for selecting the successful applicant for the supervisor position. The HR Analyst was not a person designated by the Agency to speak on its behalf regarding the merits of Grievant's criminal conviction. To the extent Grievant relied on the opinion of the HR Analyst, she did so at her own risk.

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"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.

Grievant argued that she pled guilty because feared a conviction of a felony and she received poor advice from her attorney. Although the Agency was not obligated to consider the facts underlying her conviction, the Agency considered Grievant's explanation. Grievant informed the Agency that she went to a local department store to exchange eight items of clothing that were not the correct size for her child. She had purchased them from the Department Store previously and was returning them in a Department Store bag. She located three or four items of clothing in the correct size and took them to the register. She faced very long lines so she decided to put the items back and make the exchange on a later date. As she was leaving the Department Store, an employee stopped her and asked to see her receipts. She did not have any receipts since she was returning the items. The employee used a calculator to determine the amount of the items in Grievant's bag. He told Grievant that because the amount was over \$200, he had to call the police. The Police arrived and Grievant was arrested. She retained an attorney. On the day of her trial, she was offered a deal where she "could go home" if she accepted the conviction for Petit Larceny. After consulting with her attorney, she decided to accept the agreement. She now regrets doing so.

The evidence in this case is not sufficient to support Grievant's assertion that she did not commit larceny. The Agency presented an affidavit from the arresting officer who said Grievant admitted to stealing merchandise. Grievant presented a copy of her credit card statement showing she spent \$20.81 on August 3, 2013 and \$62.28 on

⁶ *Va. Code § 2.2-3005.*

August 5, 2013 for a total of \$83.09 at the Department Store. By Grievant's account, the employee valued her items at more than \$200 but she was only able to produce credit card charges of \$83.09.

In light of the standard set forth in the Rules, 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 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.⁷

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.