

Issue: Group III Written Notice with suspension (criminal conviction of shoplifting);
Hearing Date: 07/13/05; Decision Issued: 07/18/05; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 8108



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8108

Hearing Date: July 13, 2005
Decision Issued: July 18, 2005

PROCEDURAL HISTORY

On February 10, 2005, Grievant was issued a Group III Written Notice of disciplinary action with suspension¹ for:

Circumstances: Criminal Conviction of Shoplifting on Monday, February 7, 2005.

On March 9, 2005, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On June 14, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 13, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant

¹ Although suspensions are usually issued using a number of workdays, the Agency suspended Grievant for 30 calendar days to reflect a "penalty thirty days suspension (time already served while on suspension pending the Court Hearing). See, Agency Exhibit 1, Section IV of the Written Notice.

Grievant's Representative
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with suspension for criminal conviction of shoplifting.

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 Corrections employs Grievant as a Corrections Officer Senior. Grievant is "an excellent Correctional Officer with an excellent record. She served as an Officer-in-Charge for over two years and just recently received three bonus days off under the Employee Recognition Program."² No evidence of prior active disciplinary action was introduced at the hearing.

On February 7, 2005, Grievant pled guilty to the charge of misdemeanor shoplifting (petit larceny) in violation of *Va. Code § 18.2-103*. She received a 12 month suspended jail sentence along with a \$400 fine, plus court costs.³ She was originally charged with a felony.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which

² Agency Exhibit 1, Section IV of the Written Notice.

³ Agency Exhibit 2.

require correction in the interest of maintaining a productive and well-managed work force.” Department of Corrections Procedure Manual “(DOCPM)” § 5-10.15. Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DOCPM § 5-10.16. Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DOCPM § 5-10.17.

Group III offenses include, “criminal convictions for conduct occurring on or off the job which are plainly related to job performance or are of such a nature that to continue the employees in their assigned positions could constitute negligence in regard to the agency’s duties to the public or to other state employees.”⁴ The Agency is responsible for supervising inmates, including inmates who have been convicted of felony theft. Credibility and integrity are central parts of a corrections officer’s ability to supervise inmates. For a security employee to be convicted of theft undermines his or her ability to supervise inmates. It also undermines his or her relationship with other security staff and Institution supervisors. Accordingly, a criminal conviction for theft relates to a corrections officer’s job performance. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice. A suspension of up to 30 workdays is permitted upon the issuance of a Group III Written Notice.

Following issuance of the disciplinary notice, Grievant was transferred from one unit to another unit on the same compound. She was relieved of her Officer in Charge duties and she was assigned a new work crew and scheduled for new work hours. An agency may not punish an employee but fail to mention that punishment in the Written Notice in order to prevent an employee from challenging that punishment. The Hearing Officer finds that in this case, the Agency did not transfer and alter Grievant’s work schedule for the purpose of disciplining her. Instead, the Agency moved her from one unit on the compound to another unit and relieved her of Officer in Charge duties in order to place her with employees and inmates who were less likely to know of her conviction. Employees in Grievant’s prior unit learned of Grievant’s conviction and the Agency feared their interaction with Grievant would be affected by knowledge of her conviction.

Grievant argues the Agency is inconsistently disciplining employees convicted of misdemeanors. For example, Grievant presented evidence of a Corrections Officer P who was convicted on April 18, 2002 of Driving Under the Influence contrary to *Va. Code § 18.2-266*⁵ and continued to work at the Institution but did not receive disciplinary action for his off-duty behavior. Corrections Officer C was convicted on November 13, 2003 of Driving Under the Influence⁶ and continued to work at the Institution but did not

⁴ DOCPM § 5-10.17(B)(13).

⁵ Grievant Exhibit 8-A.

⁶ Grievant Exhibit 8-D.

receive any disciplinary action. Corrections Officer T was convicted of misdemeanor reckless driving on January 16, 1997 but did not receive any disciplinary action.⁷

Although a misdemeanor conviction is inappropriate for any State employee, there is material difference between being convicted of DUI and of petit larceny. Corrections officers are involved in testifying against inmates when those inmates act contrary to Institutional Operating Procedure 861 which prohibits several categories of inmate offenses. Corrections Officers also must testify in criminal courts when they observe inmates engage in criminal behavior such as assaulting other inmates or security staff. Because Grievant has been convicted of petit larceny, her testimony is subject to impeachment as a matter of law. In Johnson v. Commonwealth, 31 Va. App. 37, 43 (2003), the Virginia Court of Appeals held:

Where the purpose of the inquiry is to impeach a witness' veracity, cross-examination concerning a witness' prior convictions is limited to prior felony convictions and convictions for misdemeanors involving moral turpitude. Misdemeanor crimes of moral turpitude are limited to those crimes involving lying, cheating and stealing, including making a false statement and petit larceny.⁸

The Court added, "prior misdemeanor convictions for assault and battery and being drunk in public were not crimes involving moral turpitude and would not have been admissible at trial to impeach [the defendant]." Grievant was convicted of a crime of moral turpitude – stealing. Based on the facts of this case, the Agency did not inconsistently discipline employees by disciplining Grievant while failing to discipline some employees convicted of misdemeanors not involving moral turpitude. There is no basis to mitigate the disciplinary action against Grievant.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension 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:

⁷ Grievant Exhibit 8-Q.

⁸ Citations and quotation marks are omitted.

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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

3. 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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
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 the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.⁹

[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].

Carl Wilson Schmidt, Esq.

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Hearing Officer