

Issue: Group I Written Notice for unsatisfactory performance, disruptive behavior and insubordination; Hearing Date: 07/25/19; Decision Issued: 07/30/19; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 11219; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11219

Hearing Date: July 25, 2018
Decision Issued: July 30, 2018

PROCEDURAL HISTORY

On March 3, 2018, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance, disruptive behavior, and insubordination.

On March 26, 2018, 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 he requested a hearing. On June 6, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On July 25, 2018, 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Department of Transportation employs Grievant as a Transportation Operator II at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Several employees including Mr. N inspected Highway 4 to determine the number of potholes on the road. They counted approximately 14 to 16 potholes requiring repair. These potholes could be filled by a three person crew in two to three hours.

On February 13, 2018, the Crew Leader assigned Grievant, Mr. B, and Mr. N responsibility to fill potholes on several Virginia Highways. The Crew Leader gave a notebook containing the assignments to Mr. B. This meant Mr. B was in charge of the group. Mr. B was responsible for driving a pickup truck with cold mix, tools, and supplies. Grievant was a passenger in the pickup truck. Mr. N drove a "crash cushion" truck. Mr. N was to position his truck behind the pickup truck as a barrier while the two men worked filling potholes.

Mr. B drove the pickup truck to Highway 4 so that he and Grievant could fill potholes. Mr. N followed the pickup truck. At 10 a.m., the Crew Leader drove to Highway 4 and observed Mr. B and Grievant inside the pickup truck on the side of the highway. Mr. N was inside his truck on the side of the highway. The Crew Leader obtained some items from the pickup truck Mr. B was driving and then left for another

destination. At approximately 2:05 p.m., the Crew Leader drove to Highway 4 and observed Mr. B's pickup truck and Mr. N's crash cushion truck in the same location he found them in the morning. He became concerned that the work crew was not working in a productive manner.

When the crew returned to the area headquarters at approximately 3:30 p.m., they had only completed work on Highway 4. They did not fill potholes on the remaining highways. The Crew Leader and Maintenance Supervisor returned to Highway 4 and counted 19 potholes filled by Mr. B and Grievant.

On February 14, 2018, the Crew Leader and Maintenance Manager met with Grievant, Mr. B, and Mr. N to discuss the crew's failure to complete the assigned tasks. The Crew Leader asked how many potholes the crew filled the prior day. Mr. B said 43 to 46 potholes. The Maintenance Supervisor said they counted 19 potholes on Highway 4. The conversation tone became tense. At some point in the conversation, Grievant asked the Crew Leader if he had been in an automobile accident. Grievant had been in an automobile accident and returned to work two days earlier. The Maintenance Supervisor dismissed Grievant's comment by saying they were not talking about automobile accidents. This irritated Grievant. The Maintenance Supervisor said he wanted to know why work orders were not being done. He said they were not talking about automobile accidents. Grievant put his hands on his knees and began standing up. Grievant said he did not have to listen to that, referring to the Maintenance Supervisor's comments. The Maintenance Supervisor said to Grievant that the meeting was not over. Grievant opened the door, said "f—k this s—t" and walked out the door.

The meeting continued for approximately twenty minutes after Grievant left. A manager entered the meeting after Grievant left and they discussed the work orders.

Grievant, Mr. B, and Mr. N received disciplinary action.

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."¹ 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."

The Agency alleged but did not establish that Grievant's work performance was unsatisfactory because he failed to complete all of the assigned tasks. The evidence

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

showed that Grievant was “doing the work of two men” and that Mr. B was responsible for the delay.

Disruptive behavior is a Group I offense.² On February 14, 2018, Grievant was as called to a meeting to discuss his work performance. Prior to the conclusion of the meeting, Grievant stood up and left the meeting. He ignored the Maintenance Supervisor’s statement that the meeting was not over. Grievant’s behavior was disruptive because he displayed contempt for the Agency’s supervisors and failed to participate in the resolution of the Agency’s discussion. Grievant was not available to respond to the questions of a manager who later entered the meeting. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that the Crew Leader’s comments and accusations were inappropriate and that when he left he did not hear the Maintenance Supervisor’s statement. Although the conversation resulted in tension among those in the meeting, the tone was not sufficiently harsh as to justify Grievant to leave the meeting. Grievant heard or should have heard the Maintenance Supervisor’s instruction that the meeting was not over.

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”³ 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. 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 I Written Notice of disciplinary action is **upheld**.

² See, Attachment A, DHRM Policy 1.60.

³ *Va. Code § 2.2-3005.*

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.