

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 04/24/18;
Decision Issued: 04/25/18; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 11178; 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: 11178

Hearing Date: April 24, 2018
Decision Issued: April 25, 2018

PROCEDURAL HISTORY

On November 8, 2017, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior.

On December 4, 2017, 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 March 12, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On April 24, 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 Crew Member at one of its facilities. No evidence of prior active disciplinary action was introduced during the hearing.

Employees at the Facility were scheduled to report to work at 7 a.m. and participate in a safety meeting. The meeting was scheduled to begin at 7 a.m. The Manager previously explained to staff, including Grievant, that employees were expected to report on time for the safety meeting.

On October 4, 2017, the Manager and approximately ten employees were holding a safety meeting at the Facility. The meeting started at 7 a.m. and the other employees were on time to the meeting and seated. Grievant arrived approximately 5 minutes late. He knew the safety meeting had started, but was humming loudly as he walked. His humming distracted the Manager. He walked to a restroom and pulled out several paper towels. This made a sound which distracted the Manager. Grievant took the paper towels and put them on the table and sat down. He began peeling a piece of fruit to eat.

The Agency decided to issue employees new identification badges and collect their old badges. On October 5, 2017, Grievant was working near a truck. The Supervisor approached Grievant and asked Grievant for his old identification badge so

that he could give Grievant a new identification badge. Grievant demanded, “Why the f—k do you need to have my old VDOT I.D. card and by who’s authority?” The Supervisor replied, “because I said so and [Grievant] why are you causing problems?” The Supervisor was offended by Grievant’s response. Grievant later claimed he was just joking with the Supervisor. The Supervisor reported Grievant’s behavior to Mr. H and the Manager.

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.”

“[D]isruptive behavior” is a Group I offense.² Grievant’s behavior on October 4, 2017 and October 5, 2017 was disruptive. He entered the scheduled safety meeting five minutes late. He was humming loudly which distracted the Manager as she spoke to the crew. He pulled paper towels which cause a sound that distracted the Manager. Grievant had to be told to stop humming. Grievant should have stopped humming once he realized a meeting was in process. On October 5, 2017, the Supervisor told Grievant why he wanted Grievant’s old ID, but Grievant demanded to know why the Supervisor needed the old ID and cursed as he did so. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior.

Grievant argued that he often hums and the Manager had not yet begun speaking about safety. The evidence showed that Grievant’s behavior was disruptive regardless of the topic of discussion or how Grievant typically behaved.

Grievant argued that he was just joking with the Supervisor about the ID badge. Regardless of whether he was joking, his behavior was disruptive to the Supervisor.

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

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

² See, Attachment A, DHRM Policy 1.60.

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

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.