

Issue: Group II Written Notice (unsatisfactory performance and failure to follow policy);
Hearing Date: 10/02/17; Decision Issued: 10/19/17; Agency: VDOT; AHO: Carl
Wilson Schmidt, Esq.; Case No.11066; Outcome: No Relief – Agency Upheld;
**Administrative Review: Ruling Request received 11/02/17; EDR Ruling No. 2018-
4640 issued 12/21/17; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11066

Hearing Date: October 2, 2017
Decision Issued: October 19, 2017

PROCEDURAL HISTORY

On April 10, 2017, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory performance and failure to follow policy.

On April 11, 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 August 10, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 2, 2017, 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. 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 employed Grievant as a Crew Leader Inmate. He had been employed by the Agency for approximately ten years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was responsible for driving a VDOT van to a local correctional institution, pick up inmates, and take the inmates to work on highways at various locations near the institution. Grievant was responsible for searching the van before he drove the van into the DOC institution. If it was dark outside, Grievant was expected to use a flash light to search the van. Grievant knew that DOC employees would search the van at the institution in the morning before inmates entered the van.

On January 19, 2017, Grievant drove the VDOT van to the local DOC institution. Once the van was on DOC property, DOC K9 officers searched the van and discovered contraband. Four cell phones¹ and chewing tobacco were found in the front cab of the van where the driver sat. They belonged to Grievant. In the back of the van where inmates sat were found sexually explicit magazines, money, sand paper, cigarette lighters, petroleum jelly, tobacco, and toilet paper used to wrap tobacco to form cigarettes. Inmates had hidden the contraband in the van the night before.

¹ Two of the cellphone did not work.

During the Agency's investigation, Grievant presented a picture to the Agency showing a corrections officer sitting in a chair holding a shotgun and handgun and the corrections officer was asleep. Grievant took the picture in October 2016 but did not disclose the picture to the Agency until February 2017.

The Agency demoted Grievant but not as part of the disciplinary action. His pay was not reduced.²

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."³ 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."

Unsatisfactory performance is a Group I offense. Grievant's failure to adequately search the van was at most a Group I offense. The Agency issued Grievant a Group II Written Notice.

DHRM Policy 1.60 lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section."

The Agency argued that Grievant should receive a Group II Written Notice because he took a picture of a corrections officer who was asleep and failed to report that observation to Agency managers or DOC managers. The Agency's judgment is supported by the evidence in this case. In October, Grievant observed an armed corrections officer sleeping and believed it was significant enough for him to take a picture of the corrections officer. When a corrections officer holding two weapons falls asleep, she poses a material security and safety threat because inmates could harm each other, VDOT employees, and the sleeping corrections officer. If VDOT and DOC did not know about an officer sleeping, they would be unable to address that security risk. Grievant did not inform the Agency or DOC of the safety risk he observed. He undermined the Agency's and DOC's ability to manage a matter of public safety.

² Grievant's demotion appears to have been voluntary.

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Grievant argued he was taught to take care of the sleeping officer by awaking her. He argued he was taught to work with the corrections officers. He argued he was told to accumulate evidence to support his concerns about how the DOC employees were treating him and, thus, he did not disclose the picture. He claimed he kept the information because a superior told him to do so. The evidence showed that the Agency's interest in public safety outweighed Grievant's perception of how he should have responded when he observed a corrections officer asleep. He was not instructed to refrain from disclosing his observation.

Grievant argued that he addressed the safety concern by telling the corrections officer to awaken. He told her that if she was tired she should wake up and walk around. Responsibility for addressing a safety concern remained with the Agency and DOC, not with Grievant.

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"⁴ 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 II 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:

⁴ Va. Code § 2.2-3005.

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.