

Issues: Group I Written Notice (unsatisfactory performance, obscene/abusive language, disruptive behavior), and Group II Written Notice (unsatisfactory performance, obscene/abusive language, failure to follow instructions); Hearing Date: 10/22/18; Decision Issued: 11/09/18; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 11264; 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: 11264

Hearing Date: October 22, 2018
Decision Issued: November 9, 2018

PROCEDURAL HISTORY

On May 8, 2018, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance, obscene or abusive language, and disruptive behavior. On May 8, 2018, Grievant was issued a Group II Written Notice for unsatisfactory performance, failure to follow instructions, and obscene or abusive language.

On June 7, 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 September 11, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On October 22, 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 Notices?

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 Maintenance Supervisor at one of its facilities.

Mr. B was the Superintendent. Grievant, Mr. M, and Mr. R reported directly to the Superintendent. Mr. R was the crew leader. His position had a lesser level of duties than did Grievant, but Mr. R did not report to Grievant or Mr. M. Mr. R reported directly to the Superintendent.

On May 26, 2017, Grievant received a Notice of Improvement Needed/Substandard Performance from the Superintendent. An example of Grievant's performance deficiency was:

Making inappropriate comments to subordinates; belittling and negatively criticizing; acting in a retaliatory manner by giving undesirable work duties; and replying in a sarcastic manner.¹

Grievant was given an Improvement Plan including:

¹ Agency Exhibit 7.

You must achieve, maintain, and uphold a neutral work environment for all employees. *** You must foster a healthy and positive work environment.²

When supervisors at the headquarters criticize subordinates, they typically did so in a manner to protect the privacy of the subordinate. They did not criticize employees in front of other co-workers. Grievant was aware of this expectation.

On March 2, 2018, the locality had experienced strong winds which caused trees to fall and emergency situations requiring responses by VDOT crews.

Mr. R was working with Mr. H. Mr. R was the crew leader. Mr. B told Mr. H, in particular, as well as Mr. R to make sure all of the necessary signs were loaded into the truck before they left. Mr. H spoke with Mr. Ri who had the truck the night before and Mr. Ri said all of the signs were on the truck. Mr. H assumed Mr. Ri was correct.

Mr. R and Mr. H were given an emergency assignment before their safety meeting ended. They entered the service truck without checking whether all of the signs were in the truck. They drove towards the assignment but came across a tree which had fallen down and was resting on powerlines. Smaller vehicles could pass under the powerlines without hitting the powerlines. Taller vehicles could have hit the powerlines without seeing them and created a risk of injury. Mr. R and Mr. H decided to stop at that location and close the road. Mr. R parked his vehicle to block the road. He was parked about 25 to 40 feet away from the powerline.

Mr. R checked the truck and realized they did not have the necessary signs and barrels to properly close the road. Mr. R asked Mr. H to call Grievant to ask for more signs and two barrels. Mr. H called Grievant and said that he did not have the required signs and barrels to close the road and asked if Grievant could bring the signs to them. Grievant responded by asking if Mr. H had been told to get signs before leaving. Grievant did not say he would bring the signs to Mr. H's location.

After Mr. H finished speaking with Grievant, Mr. H was agitated about his conversation with Grievant. Mr. R observed Mr. H after Mr. H spoke with Grievant and Mr. R could tell Mr. H was agitated. Mr. H told Mr. R, Grievant was giving "flack" about not already having the signs on the truck.

Mr. R called Grievant and asked if Grievant could bring signs to the location. Grievant questioned Mr. R as to why Mr. R did not have the proper signs. Grievant said, "You should have had signs before you left!" Mr. R said, "We don't need to be arguing, just bring us the signs we need to close the road."

Grievant and Mr. A drove a truck with additional signs to Mr. R's and Mr. H's location. Mr. A drove the vehicle and Grievant was in the passenger side of the vehicle. Mr. A parked the vehicle approximately three feet away from Mr. R's vehicle but closer

² Agency Exhibit 7.

to the powerline. The additional signs were removed from Grievant's truck and placed in the appropriate positions. After the signs were put up, Grievant and Mr. A left the location. Mr. R and Mr. H also left to go to the location of another emergency.

Later in the day, Mr. R and Mr. H went to a location near a firehouse and parked their vehicles. Grievant and Mr. A met them at that location. The vehicles were parked facing opposite directions with the driver's door of each vehicle closest to each other. The men remained in their vehicles. Grievant was on the passenger side of his vehicle. Mr. R was on the driver's side of his vehicle. Grievant began talking about having to bring signs to Mr. R and Mr. H. Grievant looked across Mr. A towards Mr. R and Mr. H and said loudly to Mr. R, "I would have expected that out of [Mr. H], but not of you given the position you are in." Mr. R became upset by Grievant's comment. Mr. R felt belittled in front of other crew members. Mr. R felt "small" because of Grievant's criticism. Mr. R apologized and said he took full responsibility for what he had done.

If Grievant wanted to criticize Mr. R, Grievant could have asked Mr. R to step outside of the truck so they could speak privately.

Grievant and Mr. M planned to reward crew employees by having a cookout at lunchtime on April 6, 2018. At 11:30 a.m., Mr. H began cooking for the cookout which he expected to take place at approximately noon and last until approximately 12:30 p.m.

Grievant and Mr. A were working at a job site away from the location of the cookout. Their work was delayed because equipment intended to heat road repair material was taking longer than expected.

Mr. A had to monitor his blood sugar level to maintain his health. He had to eat on a regular schedule to ensure his blood sugar levels were stable. Mr. A "stuck his finger" with an instrument to measure his blood sugar level. At 12:40 p.m., Mr. A told Grievant that Mr. A's sugar level was 70. Mr. A understood that a sugar reading of 70 was low and that he needed to eat. He believed that if he failed to eat he would become jittery and sweaty. If he went too long without food, he could become unresponsive. Mr. A said to Grievant, "I guess I will get off at 3 p.m. since we are working through lunch." Mr. A's voice was loud. Mr. A did not curse as he spoke to Grievant. Grievant responded, "If you don't calm down, you would be losing 25 years of service for violence in workplace."

At about 12:30 p.m., Grievant's crew had not returned to the headquarters. Since the other employees had duties to perform, they decided to not wait any longer and began eating. They finished their meals and began performing other duties. At approximately 12:50 p.m., Grievant ended the crew's work and they returned to headquarters.

An employee contacted the Superintendent and told him he needed to speak with Mr. A because Mr. A was upset. On April 16, 2018, the Superintendent met with Mr. A. The Superintendent asked Mr. A about his concerns. Mr. A was visibly upset

and was “in tears.” Mr. A said he felt he needed to apply for positions in another residency because of threats by Grievant. Mr. A was emotional and required time to calm down. Mr. A was concerned about losing his 25 years of service due to a workplace violence threat by Grievant.

Mr. A was a sensitive person who required extra direction. He easily became upset and agitated.

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.”

Group I Written Notice

“[U]nsatisfactory work performance” is a Group I offense.⁴ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On March 2, 2018, Grievant criticized Mr. R in front of two subordinate employees thereby upsetting and embarrassing Mr. R. The Agency’s practice was for supervisors to discuss unsatisfactory performance in private. Grievant was not Mr. R’s supervisor and did not have the authority to discipline Mr. R. Grievant should have asked Mr. R to get out of his truck so they could speak privately or allowed the Superintendent to address the matter. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory performance.

Group II Written Notice

Failure to follow instructions is a Group II offense.⁵ On May 26, 2017, Grievant received an instruction addressing how to communicate with co-workers. Grievant was instructed not to make “inappropriate comments to subordinates” and to “foster a healthy and positive work environment.” On April 6, 2018, Grievant told Mr. A, “If you don’t calm down, you would be losing 25 years of service for violence in workplace.” Grievant’s statement was inappropriate because Mr. A’s loud voice was not sufficient to

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

⁴ See Attachment A, DHRM Policy 1.60.

⁵ See, Attachment A, DHRM Policy 1.60.

constitute work place violence and Mr. A could not lose 25 years of service based on Mr. A's behavior. Grievant's comment did not foster a positive work environment because it upset Mr. A and made Mr. A consider seeking employment at other locations.

Grievant argued that he was simply cautioning Mr. A before Mr. A's behavior became of concern and Mr. A misconstrued his statement because Mr. A is overly sensitive. Grievant's arguments fail because his statement was contrary to the Agency's instructions to him as part of the Notice of Improvement Needed Substandard Performance.

Grievant presented evidence showing that he had a speech impediment and hearing deficiency making it difficult for him to sometimes understand others and others to understand him. He argued that the disciplinary action was unfair when compared to how other employees were treated. He argued that numerous false statements had been made about the incidents.

The Agency presented sufficient evidence to support the issuance of disciplinary action in this case. It was not how well Grievant spoke but rather what he said that supported the disciplinary action.

Mitigation

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. 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**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **upheld**.

⁶ 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.