Issue: Group I Written Notice (disruptive behavior); Hearing Date: 07/17/17; Decision Issued: 08/07/17; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 11008; 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: 11008

Hearing Date: July 17, 2017
Decision Issued: August 7, 2017

PROCEDURAL HISTORY

On December 15, 2016, Grievant was issued a Group I Written Notice of disciplinary action for disruptive behavior.[1]

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 May 2, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On July 17, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

[1] The Agency mistakenly used the code for workplace violence but Grievant's behavior was clearly not workplace violence.

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 an Administration Manager II at one of its facilities. He managed a transportation operations center (TOC). He had worked in the TOC for approximately 15 years.

The Agency is responsible for dispatching VDOT Safety Service Patrols (SSP) to motorists who are stranded on Virginia's highways. The Agency coordinates with the Virginia State Police (VSP) who often receives calls from motorists seeking assistance. When the VSP receives a call for assistance, the VSP enters that information into the VSP computer system. By agreement, VDOT has access to the VSP computer system and can monitor when a motorist needs assistance. In other words, as soon as VSP is aware of a need for assistance, so is the Agency.

The practice between VSP and VDOT had been that once VSP received a call from a motorist seeking assistance, VSP would call VDOT and ask that a SSP be dispatched to the location. The VSP would then assume VDOT had responsibility for the matter. If VDOT did not have a SSP available at the time of the call, the motorist could end up waiting for a long time on the side of a busy highway.

Grievant is passionate about ensuring the safety of motorists whose vehicles become disabled on Virginia highways. He proposed a change to the practice between the VSP and VDOT. He wanted to eliminate having the VSP make a telephone call to VDOT to inform VDOT of the need to dispatch a SSP. He believed that it was unnecessary for VSP to call VDOT given that VDOT already had access to the VSP computer system which recorded a motorist's call for assistance. By the time VSP called VDOT, VDOT was already aware of the need for assistance and may have already dispatched a SSP if one was available. Grievant wanted to follow a more logical and efficient process.

Grievant told the Supervisor of his proposed change to the VSP and VDOT relationship. The Supervisor agreed with Grievant and VSP was informed of the proposed changes.

On November 16, 2016, Grievant and the Supervisor attended a meeting also attended by the Captain and Lieutenant of the VSP. Following that meeting, the four discussed VDOT's proposal. They stood in a close circle. The Captain and Lieutenant were skeptical of the proposal probably because it had been poorly communicated to them by a VSP employee or because they misunderstood the proposal. The Captain said, "so I hear you don't want us to call you anymore?" The Supervisor said that VDOT was trying to reduce the number of phone calls and there must have been some kind of misunderstanding because VSP was concerned about how the TOC was going to dispatch SSPs. The Captain and Lieutenant expressed their objection to Grievant's proposal. The Captain questioned why VDOT would no longer support the Troopers with SSPs for disabled vehicles. He expressed that it was imperative that they continue with the process as it had been in the past. The Captain said if VSP does not call and dispatch as they had done in the past, VSP would not know if VDOT was responding.

Grievant became frustrated and took their criticism personally. He said the procedure has been established in the past and that they were not following prior established procedures.

The Supervisor told Grievant they would talk about this some more. He turned to the Captain and said we will work this out since obviously there had been some miscommunication. Grievant stepped back but leaned forward and began gesturing with his hands. Grievant was agitated. The Supervisor perceived Grievant's demeanor as reflecting an aggressive response. He perceived that Grievant had taken an aggressive stance.

A Sergeant stepped into the conversation and asked a question. One of the two VSP officers said that "this is not how we do business" and that if VDOT did not want to support the VSP then the VSP would not bother contacting VDOT. Grievant said his words were being taken out of context and that the VSP was putting words in his mouth. The Captain became upset about Grievant's comment. He said, "Well, if that is the case, then we just won't call you anymore." The Supervisor told Grievant that they

would address this later and then assured the Captain that the VSP would have VDOT full support on the roads.

The meeting ended and Grievant returned to the TOC. The TOC is a room with video monitors on the wall for employees to view. Five employees sat in two rows of workstations and utilized communication equipment to perform their duties. The employees worked for a contractor and reported to the Staff Manager. The employees viewed the Supervisor as one of their bosses.

Grievant entered the TOC and was loud and angry. Grievant said loudly to staff and then to the Staff Manager that the Supervisor had "thrown him under the bus" and that Grievant had been ambushed at the meeting by the VSP. Grievant said that the TOC would have to reverse what it was doing and do additional work because the Supervisor had not supported Grievant. Grievant questioned the Supervisor's knowledge of the TOC operations. Grievant complained to the Staff Manager about the VSP and the Supervisor for 30 to 40 minutes while staff could overhear his comments.

Several employees felt uncomfortable by Grievant's comments because they viewed the Supervisor as their boss and did not like having their supervisor's abilities questioned. The Staff Manager believed Grievant's behavior was disruptive because TOC employees could over hear his comments and they were distracted from their duties. Several days after the incident, one of the contract employees called the Supervisor to express that Grievant's comments had upset her and she felt his comments were inappropriate.

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."[2] 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

"Disruptive behavior" is a Group I offense. On November 16, 2016, Grievant was disruptive because he engaged in a heated exchange with VSP employees and then returned to the TOC to express his anger and frustration to contract employees not involved in the meeting. The contact employees were distracted from their duties because they could hear Grievant's criticisms of the Supervisor. Some contract employees were uncomfortable hearing Grievant criticize the Supervisor because the

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

employees viewed the Supervisor as one of their bosses. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that his behavior was "blown out of proportion" to what really happened and that his still maintained a good working relationship with the VSP. He pointed out that the matter could have been addressed without issuance of disciplinary action. Grievant's arguments fail because the Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for disruptive behavior. Although the Agency could have counseled Grievant, it chose to discipline Grievant and has presented sufficient evidence to support the issuance of that disciplinary action.

Mitigation

Grievant contends the disciplinary action should be mitigated. *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.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[4] (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere

[3] Va. Code § 2.2-3005.

[4] See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

pretext or excuse for retaliation. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"[5] cause of the alleged adverse action by the employer.[6]

Grievant has not presented sufficient evidence to show a connection between the protected behavior he claimed and the Agency's issuance of disciplinary action. The Hearing Officer does not believe that the Agency singled out Grievant for disciplinary action as a form of retaliation for engaging in a protected activity.

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.

[5] This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

[6] *See,* Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

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.