Issue: Group II Written Notice with demotion and 10% salary reduction (failure to follow a supervisor's instructions, perform assigned work, comply with applicable established Written Policy); Hearing Date: August 9, 2001; Decision Date: August 10, 2001; Agency: Virginia Department of Transportation; AHO: Carl Wilson Schmidt, Esquire; Case Number 5356

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of Virginia Department of Transportation Case Number 5256

Hearing Date: August 9, 2001
Decision Issued: August 17, 2001[1]

PROCEDURAL HISTORY

On May 15, 2001, Grievant was issued a Group II Written Notice of disciplinary action with demotion and 10% salary reduction for:

> *Failure to follow a supervisor's instructions, perform assigned work, comply with applicable established Written Policy. [Grievant] failed to document an employee's inappropriate behavior as prescribed by the Tardiness Policy and Supervision Instructions.*

On May 21, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 17, 2001, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 9, 2001, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Five Bridge Tunnel Patrollers
Two Traffic Control Supervisors
Supervisor
Five Safety Service Patrols

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[1] The Hearing Officer revised this decision on September 20, 2001 in response to the EDR Director's compliance ruling requesting clarification of the issue of retaliation. Although the Director suggests the Hearing Officer failed to determine the issue of retaliation, the Hearing Officer, in fact, had determined that issue, but had not specifically discussed the issue.

ISSUES

1. Whether Grievant should receive a Group II Written Notice of disciplinary action with demotion and salary reduction.
2. Whether the Agency discriminated against Grievant because of his race.
3. Whether the Agency retaliated against Grievant.

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 burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency has engaged in discrimination. 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:

Grievant has been employed with the Agency for approximately nine years. He served as a Bridge Tunnel Patrol Supervisor (BTPS). The chief objective of a BTPS is to supervise "Safety Services Patrollers and Bridge-Tunnel Patrollers directing and controlling traffic, and removing disabled vehicles on an assigned shift." (Agency Exhibit 6). Grievant's October 2000 evaluation showed his performance exceeded the Agency's expectations. Prior disciplinary action against Grievant consists of a Group II for sexual harassment[2] issued February 21, 2001 and a Group I for inadequate or unsatisfactory work performance issued on March 20, 2001. Because of the accumulation of disciplinary action, Grievant was demoted to a non-supervisory position with a ten-percent salary reduction.

Tardy employees are subject to a strict tardiness policy. Being even one or two minutes late is considered tardy and subjects the employee to the policy procedures. Under the policy, an employee who will be late must call his or her supervisor[3] before the start of the employee's shift. Calling after the start time constitutes failure to follow the policy. If an employee calls before the start of the employee's shift and if the employee arrives at work within 30 minutes of the start of the shift, then the employee's tardiness is excused but subjects the employee to a

[2] The Agency introduced testimony and documents in an attempt to re-litigate a prior grievance regarding sexual harassment. The Hearing Officer gives little weight to that evidence except to the extent it relates to whether the disciplinary action should be mitigated.

[3] In practice, a tardy employee calls the Facility office and speaks with one of several supervisors on duty rather than the employee's direct supervisor.

progressive level of documentation. Each additional tardy within a six-month period subjects the employee to progressive levels of documentation that may ultimately result in disciplinary action.

For the first excused tardiness, the employee's supervisor prepares an Employee/Supervisor Discussion Form. The Discussion Form states the cause of the tardiness and sets forth goals for preventing further tardiness. Both the employee and supervisor sign the Discussion Form.

If the employee has a second excused tardy within six months of the first excused tardy, the supervisor issues the employee a Written Counseling Letter. The Written Counseling Letter contains an Action Plan and is a different form from the Employee/Supervisor Discussion Form. An Action Plan is drafted by the employee to show how the employee will correct the tardiness problem. The employee and the supervisor must sign the Written Counseling Letter.

On March 29, 2001, an employee supervised by Grievant called the Facility to report that he would be arriving late to work because of a mechanical problem with his vehicle. The employee did not speak directly with Grievant because Grievant was away from the Facility at the time of the call. On that same day, Grievant's supervisor learned that the employee had called and reported that he would be tardy. The Supervisor instructed Grievant to investigate the events surrounding the tardiness. Grievant responded that he was in the process of talking to the tardy employee. Several days later, the Supervisor asked Grievant about the status of his investigation. Grievant responded that he was still talking to the tardy employee. A few days later, the Supervisor again asked Grievant if he had finished the paperwork regarding the tardy employee. Grievant responded that the employee had resigned and that it was useless to do the paperwork. On April 3, 2001, the Supervisor sent Grievant an email stating:

> Upon your return to work on Thursday morning complete in draft form the counseling memorandum on [tardy employee's] lateness on 29 March 2001. Attach an Employees Action-Transmittal Form to your paperwork and deliver it in person to [another employee]. Hand it to him DO NOT JUST LEAVE IT ON HIS DESK, make contract with him so he may look it over. Have it to him no later than 12:00 noon, so changes could be made if need be.

Two days later, Grievant responded to the Supervisor's email:

> Sorry, I cannot honestly do a counseling memorandum on [tardy employee] that you requested [due] to lack of information at the time it took place. My understanding [is that] [tardy employee] spoke directly to the control room. Whatever the control told [tardy employee] at that time was all right. As [tardy employee's] Supervisor I should have been notified. I had no idea [tardy employee] w[as] late until the control room called [a Facility location].

(Grievant's Exhibit 4).

Grievant ultimately prepared an Employee/Supervisor Discussion Form stating the employee was tardy for the first time rather than a Written Counseling Letter stating the employee was tardy for the second time. Grievant should have prepared a Written Counseling Letter because the employee was tardy for the second time. On February 21, 2001, Grievant presented the same employee with an Employee/Supervisor Discussion Form for being late for the first time.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." P&PM § 1.60(V)(B). Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." P&PM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." P&PM § 1.60(V)(B)(3).

Failure to follow a supervisor's instructions is a Group II offense. P&PM § 1.60(V)(2)(a). Grievant failed to follow three oral instructions and one written instruction from his supervisor. A Group II Written Notice is appropriate under these circumstances.

An employee receiving a second active Group II Written Notice should typically be discharged. P&PM § 1.60(VII)(D)(2)(b)(1). The Agency chose to mitigate Grievant's discipline by demoting him in lieu of termination along with a disciplinary salary action. P&PM § 1.60(VII)(D)(2)(c)(1). No credible evidence was presented suggesting the disciplinary action should be mitigated further.

Grievant does not believe he should be subject to disciplinary action. He argues he lacked the necessary information in order to prepare a counseling memorandum. The evidence, however, showed that (1) there was little information Grievant needed to obtain from others and (2) Grievant failed to request the information he supposedly needed.

Grievant contends he did not realize that his employee was tardy for the second time and, thus, it was a simple mistake for him to prepare an Employee/Supervisor Discussion Form rather than a Written Counseling Letter. The evidence showed, however, that Grievant knew or should have known that the employee was tardy on March 29, 2001 for the second time within a six-month period. Only five weeks earlier, Grievant had presented the employee with an Employee/Supervisor Discussion Form because of the employee's first tardy.

Grievant contends the Agency is discriminating against him based on his race as reflected by the disciplinary action taken against him. It is unnecessary to present a detailed discussion on the law governing race discrimination because there is little, if any, credible evidence[4]

[4] Grievant's submitted document suggesting an agency manager made discriminatory comments about Grievant. The document purports to be a statement from a former employee who overheard a conversation by agency management. This evidence is not credible. Grievant chose to present the

suggesting the Agency disciplined him because of his race. The Supervisor's instruction was appropriate and clear. Grievant simply chose not to follow that instruction despite repeated requests. Grievant presented evidence suggesting that he was being rotated out of sequence among the different Facility locations because of his race. The evidence showed, however, that there is no definitive sequence of rotation and many employees have been rotated contrary to what Grievant contends is the proper rotation.

Grievant argues that the Agency disciplined him and discriminated against him as a form of retaliation. Since the Agency's discipline is upheld and Grievant's claim of discrimination is denied, there is no basis to conclude that the Agency retaliated against Grievant.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with demotion and salary reduction is **upheld**. Grievant's request for relief because of alleged discrimination is **denied.** Grievant's request for relief because of alleged retaliation is **denied.**

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

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document without original signature and made no attempt to have the Hearing Officer order the former employee to appear at the hearing. Agency managers denied the allegation and their denial was very credible.

4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision.** (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq., Hearing Officer