

Issue: Group II Written Notice with termination (failure to follow supervisor's instructions, perform assigned work, or otherwise comply with established written policy), and Group II Written Notice with termination (unauthorized use or misuse of State property or records); Hearing Date: 04/16/03; Decision Issued: 05/13/03; Agency: VDOT: AHO: Carl Wilson Schmidt, Esq.; Case No. 5683



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5683

Hearing Date: April 16, 2003
Decision Issued: May 13, 2003

PROCEDURAL HISTORY

On January 24, 2003, Grievant was issued two Group II Written Notices of disciplinary action with removal for:

Group II Written Notice for "Failure to follow supervisor's instructions, perform assigned work, or otherwise comply with established written policy" in performance of assigned duties as Administrative and Office Specialist III.

Group II Written Notice for "Unauthorized use or misuse of State property or records" in performance of assigned duties as Administrative and Office Specialist III.

On January 28, 2003, 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 she requested a hearing. On March 18, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 16, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate

ISSUE

1. Whether Grievant should receive a Group II Written Notice of disciplinary action for failure to follow supervisor's instructions, perform assigned work, or otherwise comply with established written policy.
2. Whether Grievant should receive a Group II Written Notice of disciplinary action for unauthorized use or misuse of State property or records.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. 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 an Administrative and Office Specialist III until her removal on January 24, 2003. The purpose of her position was "To verify toll revenue at the [Facility] and the preparation of such funds for transfer to a banking facility."¹ She began working for the Agency in August 1996 and had been a very good and successful employee.

Grievant and her Husband separated in the early part of 2002. They have a 3 year old son. The Husband began a relationship with Ms. B. Grievant described her relationship with the Husband and Ms. B, in part, as follows:

I have told them both that I have no intention of renewing my relationship with [Husband]. [Ms. B] and [Husband] [have] been a thorn in my side

¹ Agency Exhibit 12.

since our separation. I have had to call the police to my home on several occasions, I have had to take them to court four times (including harassment), and have had them try to cause trouble at my work on two other occasions.

Actually, I had made four calls to [Husband] in the seven months prior to this letter, and all calls were in the presence of my Supervisor and/or other co-workers, all concerning our two-year old son.

The Facility developed a Violation Enforcement System (VES) “to capture and process images of vehicles that create a violation record while attempting to avoid payment of the established toll.” In other words, the VES is designed to catch drivers passing through the Facility’s tolls without paying. Under the Facility’s written policy, after a patron accumulates five violations (unpaid tolls) a Violation Notice is mailed to the patron stating the accumulated unpaid balance and informing the patron that payment in full must be made within ten days otherwise a summons from a local Court would be issued to the patron. Before a Violation Notice is sent to a patron with a Smart Tag account, Grievant must search the patron’s Smart Tag account to make sure the violations reported by VES are “true violations.”²

The VES was not always available. Sometimes the VES was not operating for a week at a time. No evidence was presented suggesting the VES was not working from December 26th, 2002 to January 8th, 2003. When the VES was not working, Grievant would often make a list of the license plates of toll violators. Once the system resumed working, Grievant would check those license plates in the system.

A Smart Tag is a device that can be attached to a vehicle to enable the electronic payment of tolls. When the device passes through the toll, the transaction is recorded on a database controlled by the Smart Tag Center located in an area away from Grievant’s Facility.³ Each Smart Tag patron has an account with the Smart Tag Center. The patron is responsible for making sure a sufficient balance is maintained in the account to pay for the toll arising each time the patron passes through the toll booth. There are two computer screens as part of each patron’s account. The first screen identifies the patron and provides general information about the account including the account balance. If a patron has insufficient funds in his or her account, the first screen will reveal this. The second screen shows detailed transaction history. Each time a patron pays a toll using the Smart Tag, the date, time, location, and amount of the toll is recorded. The second screen also shows the account balance. On a quarterly basis, the Smart Tag Center sends its customers a statement showing account transactions including account balances.

² Agency Exhibit 9.

³ Grievant accessed the Smart Tag database from her worksite.

Ms. B opened an account with the Smart Tag Center. When her account balance was at zero, she usually deposited \$10 or \$15 into the account. The Husband constantly used Ms. B's Smart Tag device. He contacted Grievant and asked her to check on "their" Smart Tag account. Ms. B had not authorized the Husband to check Ms. B's account. Ms. B did not authorize Grievant to review Ms. B's Smart Tag account.

On December 11, 2002, Ms. B contacted the Smart Tag Customer Service Center and complained that someone was accessing her personal information and monitoring when she passed through the Facility's toll. As a result of Ms. B's complaint with the Smart Tag Center, VDOT installed Spector Monitoring software at the Facility. The Facility's Accounting Department's Read-Only access computer terminal was monitored from December 26, 2002 through January 8, 2003.

Grievant accessed Ms. B's account on December 27, 30, 31 and January 2, 3 and twice on January 6. This is every business day beginning on December 27th. Grievant did not issue a Violation Letter to Ms. B. Grievant had been checking Ms. B's account periodically since October. When Grievant entered Ms. B's Smart Tag account, Grievant did not stop at the screen that provided Ms. B's personal information and account balance. Instead, Grievant proceeded to the transaction page, which provides times, dates, and lane information regarding when Ms. B's Smart Tag crossed the facility. Grievant accessed five other Smart Tag accounts multiple times from December 24, 2002 through January 8, 2003. Violations were recorded on the Violation Enforcement System for all five accounts.

On December 30, 2002, Grievant attended a staff meeting. Minutes from that meeting state:

Each member was reminded to be very careful when using state equipment and time, such as the computers. If someone doesn't know if what they intend on doing is OK, they can go to [supervisory staff] for advice. If they don't have an answer, they will contact the proper person to get guidance. The final words of advice was, "If you are in doubt whether something is OK or not, don't do it."⁴

CONCLUSIONS OF POLICY

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." DHRM § 1.60(V)(B).⁵ Group II offenses "include acts and behavior which are

⁴ Agency Exhibit 11.

⁵ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

more severe in nature and are such that an additional Group II offense should normally warrant removal.” DHRM § 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.” DHRM § 1.60(V)(B)(3).

Group II Written Notice – Unauthorized Use

“Unauthorized use or misuse of state property or records” is a Group II offense.⁶ Patron records contained in the Smart Tag Center are owned or controlled by the Commonwealth. When Grievant accessed the second screen of Ms. B’s Smart Tag account, Grievant used that information for her personal benefit without authorization. Her actions support the Agency’s issuance of a Group II Written Notice for unauthorized use of State records.

Grievant contends she was accessing the Smart Tag system to find out if Ms. B had a negative balance thereby justifying issuance of a violation letter. If Grievant wished to determine whether Ms. B had a zero balance on her account, Grievant could have entered Ms. B’s Smart Tag account and read from the first screen indicating the balance on Ms. B’s account. Detail information regarding the dates, times, and toll charges for specific times Ms. B’s Smart Tag device crossed one of the Facility’s tollbooths was recorded on a second screen. Grievant would not need to access that second screen.⁷ By accessing that second screen, Grievant demonstrated that her intent was to monitor the movement of Ms. B’s Smart Tag device and, thus, the movement of her Husband or Ms. B.

Group II Written Notice – Failure to Follow Policy

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.⁸ Facility policy permitted Grievant to access Ms. B’s Smart Tag account information only after at least five violations were first established under the Violation Enforcement System. Ms. B had no violations under the VES and, thus, there was no reason for Grievant to have accessed Ms. B’s Smart Tag account.

On the one hand, Grievant contends she was treating Ms. B’s account like any other account. On the other hand, Grievant indicated she was monitoring Ms. B’s account at the request of the Husband. Grievant clearly treated Ms. B’s account

⁶ DHRM § 1.60(V)(B)(2)(e).

⁷ Agency Exhibit 6 shows the first and second screens of the Smart Tag account for Ms. B. For the days listed, the account balance on the first screen matches the balance shown on the second screen. Thus, it was unnecessary for Grievant to access the second page when the information she sought was available on the first page.

⁸ DHRM § 1.60(V)(B)(2)(a).

differently from the accounts of other patrons for which she sent violation letters. Most of the violations covered violations occurring over a several month period. For example, Patron S had 22 toll violations from August 27, 2002 to December 31, 2002. Grievant sent a Violation Notice to Patron S on January 3, 2003. Patron D had seven violations over a 22 month period of time beginning February 8, 2001 and ending January 2, 2003.⁹ If Grievant had been checking these patrons every day as she had checked Ms. B's account, Violation Notices would have been sent much sooner.

Grievant contends her procedure was to check both the first and second screen for all suspected violators. This assertion is not credible since if Grievant's objective was to determine whether an account deficit existed, she could determine this without going to the second screen. Grievant contends she viewed the second screen in order to determine at what time she would need to access the VES. This contention fails because Grievant would only need to access the VES after viewing the Smart Tag account if the Smart Tag account showed a deficit. Ms. B's account did not show a deficit during the period in question.

Grievant contends she regularly checked accounts with low balances and Ms. B had a low balance on her account. This assertion is not credible given that only after five violations would the Agency send out a Violation Notice. If Grievant knew a patron had four violations and was operating on a low balance, then it might make sense for her to closely monitor that patron. Ms. B did not have any outstanding violations. There would be no benefit to the Agency for Grievant to monitor Ms. B's account on a daily basis since a violation by Ms. B during the period of December 26, 2002 to January 7, 2003 would not have justified issuance of a Violation Notice.

Grievant contends that because she was found qualified for unemployment benefits by the Virginia Employment Commission that qualification shows she did not act contrary to VDOT policy. The outcome of grievance hearings depends on the evidence presented during the grievance hearing. VEC decisions are not binding on a Hearing Officer and are not relevant in grievance hearings since it is unclear upon what evidence the VEC decision-makers relied.¹⁰

The Agency used one Written Notice form to list two separate Group II Written Notices. This procedure is unusual since the Agency is relying on the accumulation of two Group II Written Notices but only one Written Notice appears to have been issued. Although this practice is not customary, it does not create a material flaw in the Agency's case. The Written Notice as written places Grievant on notice that she will have to defend two separate Group II offenses.

⁹ Agency Exhibit 7.

¹⁰ It is unnecessary for the Hearing Officer to rule on the statutory admissibility of Grievant Exhibit 1, VEC decision, since the outcome of that proceeding carries no weight in this grievance hearing.

Accumulation of a second active Group II Written Notice “normally should result in discharge.”¹¹ Grievant accumulated two Group II Written Notices thereby justifying the Agency to remove her from employment.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of two Group II Written Notices of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

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.¹²

¹¹ DHRM § 1.60(VII)(D)(2)(b).

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

Carl Wilson Schmidt, Esq.
Hearing Officer