

Issue: Group I Written Notice (moving traffic violation while using a State-owned vehicle); Hearing Date: 01/15/04; Decision Issued: 01/15/04; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 485



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 485

Hearing Date: January 15, 2004
Decision Issued: January 15, 2004

PROCEDURAL HISTORY

On September 11, 2003, Grievant was issued a Group I Written Notice of disciplinary action for:

Conviction of a moving traffic violation while using a state-owned or other public vehicle. Received a traffic violation for failure to yield to oncoming traffic causing an accident, resulting in significant damage to the right front end of the van.

On October 30, 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 December 16, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 15, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Representative

Witnesses

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for conviction of a moving traffic violation while using a State-owned vehicle.

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. 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 Department of Mental Health Mental Retardation and Substance Abuse Services employs Grievant as a Health Care Technician at one of its Facilities. She was employed by the Agency in 1977 and has received favorable evaluations for her service to the Commonwealth. No evidence of prior disciplinary action against Grievant was introduced.

On August 30, 2003, Grievant's supervisor instructed Grievant to use a State-owned vehicle and obtain food for two nurses. If either of the nurses left the Facility, it would leave the Facility unable to adequately care for patients. Grievant was not obtaining food for herself. She left the Facility driving a State-owned van. She encountered a busy intersection. As she attempted to enter traffic lane, her vehicle and another vehicle collided. The State-owned vehicle required repairs costing several thousand dollars. Grievant was issued a traffic summons and appeared in General District Court on October 14, 2003. She was convicted of a moving traffic violation and fined \$100.

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).¹ 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.” 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 I offenses include, “Conviction of a moving traffic violation while using a state-owned or other public-use vehicle.” On October 14, 2003, Grievant appeared in General District Court, pled “not guilty” but was convicted of violating *Va. Code § 46.2-821, Vehicles before entering certain highways shall stop or yield right-of-way*. She was fined \$100. Based on this evidence, the Agency has established that Grievant’s behavior rises to the level of a Group I Written Notice. Accordingly, the Group I Written Notice must be upheld.

Va. Code § 2.2-1001 requires the EDR Director to “[a]dopt rules ... for grievance hearings.” The *Rules for Conducting Grievance Hearings* set forth the Hearing Officer’s authority to mitigate disciplinary action. The Hearing Officer may mitigate based on considerations including 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, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argues that the disciplinary action should be mitigated to a written counseling. She is clearly a good and valuable employee to the Agency. Grievant had adequate notice of the rule she was accused of violating. The Agency issues Group I Written Notices to other employees convicted of moving traffic violations. No evidence of an improper motive by the Agency was presented. Based on the standard set forth by the EDR Director in her *Rules for Conducting Grievance Hearings*, Grievant has not established a basis to mitigate the disciplinary action against her.

Grievant contends the Agency was inconsistent in the sense that it chose to discipline under one set of facts (conviction of a moving traffic violation), but chose not to discipline under a different set of facts (personal use of State property). Although the Agency chose not to issue disciplinary action for personal use of State property, the Agency treated Grievant the same as it treated other employees using State property for a personal benefit. In other words, no employees (including Grievant) were disciplined for using State property for personal reasons. The Agency did not act inconsistently with respect to Grievant.

¹ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

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 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

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.²

[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

² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.