

Issue: Group I Written Notice (unsatisfactory work performance); Hearing Date: 02/02/05; Decision Issued: 03/02/05; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 7957



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7957

Hearing Date: February 2, 2005
Decision Issued: March 2, 2005

PROCEDURAL HISTORY

On July 23, 2004, Grievant was issued a Group I Written Notice of disciplinary action for:

Accepted an improperly staffed shift.

On August 13, 2004, 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 27, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 2, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for unsatisfactory work performance.

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 Virginia Department of Transportation employs Grievant as a Traffic Control Supervisor at one of its Facilities. The purpose of her position is:

To perform Traffic Management activities of assigned [Facility] and monitoring of CCTV surveillance systems by taking immediate remedial actions through the traffic control and ventilation system either by computer program or manual command, instruct others and/or notify State/Local Police, fire rescue, Coast Guard, Navy and/or other agencies especially during incidents, accidents, and heavy traffic.¹

Minimum staffing levels for Grievant's shift require two Traffic Controllers.² Only Agency managers may approve a request for a shift to have fewer than two Traffic Controllers. If a shift Supervisor believes his or her shift may have fewer than two Traffic Controllers arriving to work, the Supervisor may instruct a Traffic Controller on the existing prior shift to continue working an additional four hours. During a staff meeting on January 7, 2004 which Grievant attended, Grievant's supervisor stated:

Mandatory overtime is not optional. For example, when the relief employee fails to show up for work, it is mandatory for the on-duty employee to remain on-duty for an additional 4 hours.³

¹ Agency Exhibit 10.

² Agency Exhibit 5.

³ Agency Exhibit 7.

As part of a change of shifts, the Incoming and Outgoing Traffic Control Supervisors exchange a Pass Down Log. This Log asks “Was the 10 p.m. – 6 a.m. shift left with at least two (2) Traffic Controllers (TC)?” The form contains a place for the Outgoing Supervisor to check “yes” or “no” and then write his or her initials. The form also contains a place for the Incoming Supervisor to check “yes” or “no” and then write his or her initials. If the question is checked “no”, a space is provided to write an explanation. During a staff meeting on October 30, 2003 which Grievant attended, Agency managers mentioned that “Supervisors should not sign the pass down logs until the necessary work has been completed.”⁴ As part of a written counseling memorandum dated November 10, 2003, Grievant was advised “as a supervisor it is your responsibility to ensure that the facility is properly staffed at all times.”⁵

On July 7, 2004, Grievant arrived a few minutes before 10 p.m. to begin working her shift at the Facility. The Outgoing Supervisor informed her that only one of the two Traffic Controllers scheduled to work with her would be coming to work. He had checked the “no” box on the Pass Down Log and wrote his initials to indicate that Grievant would not have two Traffic Controllers. Grievant also checked the “no” box and initialed the Pass Down Log.

Grievant asked the Outgoing Supervisor if he could stay and work. He said he could not do so. Grievant lacked the authority to force the Outgoing Supervisor to stay at work. Ms. RT, however, was about to end her shift working as a Traffic Controller for the Outgoing Supervisor. Although Grievant had the authority to do so, Grievant did not instruct Ms. RT to remain and work an additional four hours. Ms. RT left shortly after 10 p.m.

At approximately 10:08 p.m., Grievant called her supervisor, the Assistant Superintendent, and explained the problem.

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).⁶ 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).

⁴ Agency Exhibit 7.

⁵ Agency Exhibit 8.

⁶ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or 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.

Grievant was responsible for ensuring that her shift had at least two Traffic Controllers. One of the two Traffic Controllers did not show up to work on Grievant’s shift. Grievant was informed of this before her shift began. Grievant should have instructed⁷ Ms. RT from the prior shift to remain at work and continue working for an additional four hours of mandatory overtime.⁸ By failing to do so, Grievant operated her shift with fewer staff than required. Her actions amounted to unsatisfactory job performance thereby justifying issuance of a Group I Written Notice.

Grievant contends that the Outgoing Supervisor was at fault for not anticipating the staffing shortage and attempting to avoid it and for not agreeing to remain as a worker. Grievant is correct that the Outgoing Supervisor was at fault. His fault, however, did not prevent her from taking action on her own to resolve the problem she faced.⁹

Grievant contends the Assistant Superintendent could have called the Outgoing Supervisor on his cell phone and instructed him to return to work the shift. Although this is true, it did not have any effect on Grievant’s ability to ask Ms. RT to remain at work for an additional four hours.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

⁷ Grievant asked another employee from the prior shift if she could remain to work with Grievant. That employee refused because she “had other things to do.” That employee did not construe Grievant’s statements to be an instruction but rather understood them to be a request which she was free to decline.

⁸ Grievant asked the Outgoing Supervisor if Ms. RT could continue working, but Grievant did not speak with Ms. RT. The Outgoing Supervisor said Ms. RT was in overtime status meaning Ms. RT had come to work on her day off. Grievant mistakenly construed the Outgoing Supervisor’s comments to mean Ms. RT had already worked 16 hours and could not be asked to work another 4 hours. To the extent Grievant assumed Ms. RT could not work without speaking to Ms. RT directly, Grievant made an assumption at her own risk.

⁹ The Outgoing Supervisor received a counseling memorandum. Agency witnesses testified that if he were to repeat his behavior, he would receive a Group I Written Notice. Similarly, Grievant received a counseling memorandum regarding shift staffing and is now receiving a Group I Written Notice.

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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.¹⁰

[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].

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer