

Issue: Group II Written Notice with suspension (failure to follow supervisor's instructions); Hearing Date: 12/13/05; Decision Issued: 12/27/05; Agency: DRS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8020



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8020

Hearing Date: December 13, 2005
Decision Issued: December 27, 2005

PROCEDURAL HISTORY

On August 20, 2004, Grievant was issued a Group II Written Notice of disciplinary action with suspension from August 23, 2004 to September 3, 2004 for failure to follow supervisory instructions. On September 1, 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 he requested a hearing. On November 22, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 13, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUE

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. 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 Rehabilitative Services employs Grievant as a Rehabilitation Engineer at one of its Facilities. Some of his duties include designing and building equipment for clients. He has been working for the Agency for approximately 28 years. The Agency recently has evaluated his work performance as a "Contributor".¹ Grievant received a Group II Written Notice on February 1, 2002.²

One of Grievant's accomplishments was to design and build a Rehabilitation Engineering Mobile Unit in 1985. This vehicle contained all of the necessary tools and equipment to enable Agency employees to travel to various locations throughout the State and provide essential services directly to clients. For example, if a client needed an alteration to a wheelchair, Agency employees could provide those alterations immediately and to the client's specifications. Through Grievant's initiative, corporate and community donors provided welding supplies, tools, and other items necessary to complete the mobile unit.

¹ Agency Exhibit 8.

² Agency Exhibit 6.

Employees in another area wished to borrow the mobile unit for a limited period of time. Grievant was concerned that clients in he customarily served would be without access to the mobile unit. He also knew that the employees in the other area needed a mobile unit with wood working tools. His mobile unit contained mostly metal working, not wood working equipment. Grievant concluded the best solution would be for the Agency to obtain a school bus and convert it into a mobile wood working shop. He made this suggestion to his Supervisor who was initially supportive but wished to have managers in her chain of command consider the option.

On March 11, 2004, Grievant copied an email to his Supervisor stating that the County's Transportation Director had approved his request for a donated bus. The Supervisor notified a manager, Ms. MG, of the proposed bus donation. Ms. MG sent the Supervisor and Grievant an email dated March 12, 2004 stating:

I have discussed the proposal of outfitting a donated school bus with [Ms. JS]. At this point we do not believe that this is a feasible option to pursue as we have no resources to equip and maintain an old school bus. In addition to this it would be a major undertaking to retrofit it and would take

share the mobile unit

Grievant did not agree with Ms. MG's decision and believed she may not have a complete understanding of all the information necessary to make a decision. On March 12, 2004 at 5:01 p.m., Grievant sent Ms. MG an email with a copy to the Supervisor stating:

I thought you understood that I am willing to take care of EVERYTHING! Just like when I built MINE. Remember, I showed [two other employees] **already have** stored here. I didn't have er. I got over \$80,000 worth of corporate donations for the first one! People WILL give to a worthy project AINLY a worthy project! I know that they wouldn't know one, but I did anticipate that they might simply lend a hand for days. But it almost appears like you're looking a gift horse in t want it, then we'll just do it, and keep it here for those heavier mobile fabrication needs. I was expecting to have it ready for you within a month. Just let me know what you want us to do.

On March 17, 2004 at 11: 50 a.m., Ms. MG sent Grievant an email with a copy to the Supervisor regarding the subject of a Mobile Truck and stated:

I have discussed the school bus proposal with several others in the [Division] and at this point we do not think this is a feasible plan as there r maintenance, repairs and keeping an old school e are just too many unknowns in this climate that is

so fiscally tight. We certainly appreciate your willingness to help out and should our financial situation change we will be in a position to consider this or other options like renting space for a regular shop. Thanks.

Grievant disagreed with Ms. MG's decision and again attempted to outline his reasoning for obtaining the bus. On March 17, 2004 at 6:05 p.m., Grievant sent Ms. MG an email stating, in part, "The face of the matter is, they have donated a bus that is STILL IN SERVICE, and which will have NO REPAIRS NEEDED, in order to immediately begin utilization. *** We have already begun to collect the needed benches, tools and machines, and we met with [another employee] today, who personally agrees that this idea is by FAR, the only LOGICAL solution to YOUR CLIENT'S needs in the [region] because it WILL HAVE the right equipment on board, and our existing unit does NOT. *** We ALL have a NO LOSE proposition in our hand here. I simply ask that you exercise an open mind, and trust those of us who have been down in these trenches for a long time! It WILL work out BEST for ALL! Have I ever led you astray?"

On March 17, 2004, the Supervisor met with Grievant and told Grievant to "let the bus idea drop" unless she asked him to pursue it further.³ On May 17, 2004 at 3:31 p.m., Grievant sent the Supervisor an email regarding questions about a client. Included in the email was a discussion of the bus. Grievant stated, in part, "I am anticipating us getting the bus as quickly as they are removed from service at school's end (just weeks away.) [A]s you know [Ms. MG] does not want the bus." Grievant expected to outfit the bus with woodworking equipment but retain it at his office's location. On May 18, 2004 at 9:07 a.m., the Supervisor sent Grievant an email stating, in part, "Additionally, a reminder that I also asked you to let the bus idea drop unless I asked you to pursue it further."⁴

In August 2004, an Agency employee noticed a school bus parked in the parking space where the Rehabilitation Engineering Mobile Unit is customarily parked. On August 12, 2004, Grievant took title to a County school bus that was parked in that parking space. The back of the title describes the sales price as "DONATION" and the purchaser's name as "[Grievant] (to BUILD R.E. Shop).⁵ Subsequently, the bus was returned to the County with the title restored to the County.

CONCLUSIONS OF POLICY

³ Agency Exhibit 1. On March 23, 2004, the Supervisor sent an email to her supervisors stating, "I told [Grievant] to encourage [another employee] to discuss any concerns or thoughts he had regarding the mobile unit directly with [Ms. MG]. I also told him to let the bus idea drop unless I asked him to pursue it further."

⁴ Agency Exhibit 2.

⁵ Agency Exhibit 4.

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).

“Failure to follow a supervisor’s instructions” is a Group II offense.⁷ Grievant’s Supervisor instructed him on March 17, 2004 to “let the bus idea drop”. Grievant should have discontinued his pursuit of the country school bus at that time. On May 18, 2004, the Supervisor reminded Grievant that he should not attempt to obtain a school bus. In August 2004, Grievant acted contrary to the Supervisor’s instruction and obtained physical possession and legal title to a school bus. By doing so, he acted contrary to his Supervisor’s instructions thereby justifying issuance of a Group II Written Notice. Upon the issuance of a second active Group II Written Notice, an employee may be suspended for up to 30 workdays as an alternative to discharge.⁸ Grievant’s suspension is consistent with DHRM policy and must be upheld.

Grievant contends that his agreement with the County to purchase the bus had been completed on March 11, 2004 and this date preceded the Supervisor’s instruction to discontinue pursuit of the bus. Grievant’s argument fails. Grievant could have contacted the County administrator in March 2004 to inform him that Grievant would no longer be seeking a bus. The bus would not have been delivered. Instead, Grievant obtained possession of the bus and legal title to the bus in August 2004. Neither he nor the Agency was obligated to obtain possession and legal title of the bus.

Grievant argues that he understood that if Ms. MG did not want the bus for her area, he continued to want the bus for his office. Grievant’s understanding does not relieve him of responsibility for failing to follow the Supervisor’s instruction because the Supervisor did not distinguish between a bus intended for Ms. MG and a bus intended for Grievant’s Facility. If Grievant was unclear, he should have sought clarification from the Supervisor.

Grievant contends he took title to the bus in his own name and the Supervisor’s instruction did not extend to govern his private behavior. Although the title may have been placed in Grievant’s name, the evidence is clear that Grievant intended for the bus to be Agency property and to be used in the Agency’s operations. The name on the title

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

⁷ DHRM § 1.60(V)(B)(2)(a).

⁸ DHRM § 1.6(VII)(D)(3)(b)(1).

does not prevent Grievant from being held responsible for disregarding his Supervisor's instruction.

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 Employment Dispute Resolution...."⁹ Under the EDR Director's *Rules for Conducting Grievance Hearings*, 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**.

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

⁹ Va. Code § 2.2-3005.

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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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