

Issue: Group I Written Notice (unsatisfactory work performance); Hearing Date: 03/15/06; Decision Issued: 03/23/06; Agency: Dept. of Mental Health, Mental Retardation and Substance Abuse Services; AHO: Carl Wilson Schmidt, Esq.; Case No. 8296; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8296

Hearing Date: March 15, 2006
Decision Issued: March 23, 2006

PROCEDURAL HISTORY

On December 2, 2005, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance. On December 22, 2005, 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 February 23, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 15, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
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 Mental Health Mental Retardation and Substance Abuse Services employs Grievant as a Plumber/Steamfitter at one of its Facilities. The purpose of his position is:

To provide preventive maintenance and repairs to buildings, equipment, and vehicles; provide maintenance and up-keeping of grounds including landscaping, snow removal, and general upkeep of roads and sidewalks, supplies water and steam to the facility.¹

Grievant's Employee Work Profile sets forth his Core Responsibilities including to Maintain Equipment. To measure Grievant's work performance with respect to maintaining equipment, Grievant is expected to "Recognize repair requirements beyond [preventive maintenance] scope and report them to supervisor or Work Control to create work orders for future accomplishment."² No evidence of prior disciplinary action against Grievant was introduced during the hearing.

¹ Agency Exhibit 1.

² Agency Exhibit 1.

The Agency's Facility has a Physical Plant that generates steam. The steam is transferred through pipes to various buildings forming a Campus for residents. The Kitchen Building is where all meals are prepared for residents. Dishes, etc. are also cleaned in the Kitchen Building. The Kitchen Building is supplied with steam from a main line. If the main line fails to work, a secondary line is activated to carry steam.

On November 14, 2005, Grievant received a Work Order indicating that there was "NO STEAM IN KITCHEN AREA."³ At approximately 12:15 p.m., Grievant walked to the Kitchen Building. He inspected the steam pipe and concluded that "the pilot valve on the Spence valve on one of the two steam lines feeding the dish machines and the cooking line had failed." He began to repair the system but his initial attempt failed. The Zone Mechanic⁴ approached Grievant and asked what was wrong with the steam. Grievant explained the problem and said he would have the problem repaired by 2:30 p.m. otherwise he would turn on the secondary steam line. At approximately 2:30 p.m., Grievant realized he could not repair the main line so he turned on the secondary steam line. Grievant noticed that the secondary steam line had two gasket leaks. These leaks had been reported to Agency managers several months earlier but not been repaired.

Grievant left the Kitchen Building and went to another Building where his Supervisor was working. Grievant told the Supervisor that the steam to the dish machine was on but that there were several leaks in the line. Grievant began assisting the Supervisor and another employee with the installation of an air compressor at that Building. The Zone Mechanic came to the Building and told Grievant of a problem with the steam pipe in the Kitchen Building. Grievant and the Zone Mechanic returned to the Kitchen Building. Grievant attempted to make additional repairs but steam continued to leave from the pipe. The Zone Mechanic walked upstairs in the Kitchen Building to speak with the kitchen supervisors. He informed the kitchen supervisor of the problem and then walked back down to Grievant's location. The Zone Mechanic then instructed that the steam should be cut off.⁵ Although Grievant did not report to the Zone Mechanics, Grievant complied with the Zone Mechanic's instruction because Grievant agreed that it would not be safe to permit steam to blow around worker's feet.

Grievant left the Kitchen Building and began trying to locate his Supervisor. Grievant went to the shop but the Supervisor was not there. Several minutes after his shift ended, Grievant left the Facility to go to the grocery store to purchase food for a family member for whom he was concerned. Grievant did not attempt to use a radio to contact the Supervisor because he was not issued a radio on that day. He did not attempt to report the matter to the Work Center in lieu of reporting it to the Supervisor.

³ Agency Exhibit 3.

⁴ The Zone Mechanic is responsible for correcting problems he observes in the buildings he monitors. He is a carpenter by training and is not an expert in plumbing or steam.

⁵ The Zone Mechanic was concerned about the effect the steam would have on electrical panels and other equipment in the room.

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).

“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’s Employee Work Profile sets forth his obligation to report maintenance problems to his supervisor or to Work Control. The Agency’s Safety Policy provides that employees shall, “Report damaged equipment and/or property to their supervisor or Work Control for repair.”⁷ Grievant understood this expectation. For example, he attempted to report the matter to his Supervisor but could not find the Supervisor. Grievant should have attempted to call the Supervisor by radio⁸ or telephone, or attempted to call the Work Center and ask that a message be sent to the Supervisor. Instead, he left the Facility without reporting the matter to his Supervisor thereby acting contrary to the expectations created under his EWP. The Agency has presented sufficient evidence to support its issuance of a Group I Written Notice.

Grievant argues his duty to report under his EWP only arises with respect to preventive maintenance and the problem Grievant discovered was not preventive maintenance. Grievant’s argument fails because the EWP expressly refers to recognizing and reporting “repair requirements **beyond** [preventive maintenance].”⁹ (Emphasis added.) Grievant encountered a problem that was beyond preventive maintenance and was obligated to report that problem to his supervisor or to Work Control. Grievant did neither.

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

⁷ Agency Exhibit 2.

⁸ Grievant could have borrowed a radio from another employee.

⁹ Agency Exhibit 1.

Grievant argues that the Zone Mechanic told the Physical Plant Services Director¹⁰ and thus, it was no longer necessary for Grievant to inform his Supervisor about the problem.¹¹ To justify issuance of a Group I Written Notice, it is not necessary for the Agency to show actual damage arising because Grievant failed to report the matter. The Agency has demonstrated that Grievant had a duty to report the problem to his Supervisor and then failed to make that report. The Agency has met its burden of proof to establish a Group I offense.

Grievant contends the disciplinary action should be mitigated. He argues that if the Agency had taken better care of its steam pipes rather than letting them fall into disrepair, the pipe would not have begun leaking and Grievant would never have been placed in the position of having to repair and report the pipe problem.

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....”¹² 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.” Whether the Agency chooses to leave its steam pipes at risk of rupture is a management decision within the discretion of Agency managers. That decision is not one that would have the effect of excusing Grievant’s work obligations. 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 I Written Notice of disciplinary action is **upheld**.

APPEAL RIGHTS

¹⁰ Grievant’s Supervisor directly reported to the Physical Plant Services Director. The Zone Mechanic also reported to the Physical Plant Services Director, but the Zone Mechanic did not report to Grievant’s Supervisor.

¹¹ The Physical Plant Services Director learned that the steam had been shut down approximately 13 minutes after Grievant left the Facility.

¹² Va. Code § 2.2-3005.

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.¹³

¹³ 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