

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow supervisory instructions); Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8357; Outcome: Agency upheld in full.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8357**

Hearing Date: June 13, 2006  
Decision Issued: June 15, 2006

**PROCEDURAL HISTORY**

On February 28, 2006, Grievant was issued a Group II Written Notice of disciplinary action with removal based on the accumulation of disciplinary action for failure to follow a supervisor's instructions.

On March 20, 2006, 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 May 17, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 13, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
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 Virginia Department of Transportation employed Grievant as an Engineering Technician III at one of its Facilities until his removal effective March 1, 2006. The purpose of his position was:

To support improvements to the state transportation system by preparing and reviewing highway plans for the acquisitions of right of way and construction or reconstruction of road facilities.<sup>1</sup>

He had been employed by the Commonwealth for approximately 19 years. Grievant had prior active disciplinary action. On June 6, 2005, Grievant received a Group I Written Notice.<sup>2</sup> On June 21, 2005, Grievant received a Group II Written Notice.<sup>3</sup> On

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<sup>1</sup> Agency Exhibit 2.

<sup>2</sup> Agency Exhibit 10.

<sup>3</sup> Agency Exhibit 11.

February 2, 2006, Grievant received a Group I Written Notice.<sup>4</sup> On February 28, 2006, Grievant received a Group I Written Notice.<sup>5</sup>

Grievant developed a pattern of tardiness and poor attendance. On May 31, 2005, Grievant's Supervisor sent Grievant an email describing his recent unscheduled leave from May 16, 2005 through May 24, 2005. In addition, the email stated:

In order to better manage your attendance and in accordance with policy, the following guidelines are immediately put into effect.

- Absences from work for personal or vacation time off must be approved as far in advance as possible, providing your supervisor with at least 48 hours advance notice.
- Sick related absences should be reported immediately, within the first 30 minutes of the workday, speaking directly with your immediate supervisor.
- Verification of the necessity of sick leave will be required for absences of more than one day, as well as absences occurring the day before or after a weekend or holiday.
- Failure to provide management with the appropriate verification may result in denial of the request for leave and could result in further disciplinary action under the Standards of Conduct.

The Supervisor discussed the terms of the email with Grievant. Both the Supervisor and Grievant signed a statement on June 1, 2005 stating, "This is to confirm that the above guidelines for the approval of sick, personal and annual leave were discussed."<sup>6</sup>

On Monday, February 13, 2006, Grievant arrived at work approximately 20 minutes late. Later in the morning at approximately 10:10 a.m., Grievant told the Supervisor that he was sick and needed to go home. The Supervisor told Grievant he could submit a leave slip if he felt he was too sick to work. The Supervisor reminded Grievant to see a doctor for verification of his sick leave in accordance with their agreement. Grievant left work. On Grievant's next day of work, he did not present a doctor's excuse to the Supervisor because he had not obtained an excuse.

### **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

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<sup>4</sup> Agency Exhibit 12.

<sup>5</sup> Agency Exhibit 16. Grievant did not appeal this Written Notice.

<sup>6</sup> Agency Exhibit 3.

require correction in the interest of maintaining a productive and well-managed work force.” DHRM § 1.60(V)(B).<sup>7</sup> 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, perform assigned work, or otherwise comply with established written policy” is a Group II offense.<sup>8</sup> On May 31, 2005, Grievant was instructed by his Supervisor that “[v]erification of the necessity of sick leave will be required for ... absences occurring the day before or after a weekend or holiday.” February 13, 2006 was a Monday, a day after a weekend. Grievant was obligated to provide verification of his sickness. He was reminded of his obligation by the Supervisor before he left work. Grievant did not comply with the Supervisor’s instruction thereby justifying the issuance of a Group II Written Notice.

Upon the accumulation of two active Group II Written Notices, an employee may be removed from employment.<sup>9</sup> With the disciplinary action upheld as part of this appeal, Grievant has accumulated two Group II Written Notices thereby justify his removal from employment.

Grievant contends he was instructed to get a doctor’s note only on days he was to be absent for an entire day. Grievant’s argument fails because the email also requires Grievant to provide verification on a day after a weekend. In addition, the Supervisor reminded Grievant of his obligation before Grievant left for the day.

Grievant contends the disciplinary action should be mitigated. *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....”<sup>10</sup> 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

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<sup>7</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>8</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>9</sup> DHRM Policy 1.60(VII)(D)(2).

<sup>10</sup> *Va. Code § 2.2-3005.*

standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>11</sup> (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence raises a sufficient question as to whether the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant contends the Agency retaliated against him because, in June 2005, he complained to the Agency's Equal Employment staff about an item located on the District Location and Design Engineer's desk. The District Location and Design Engineer testified he received a call from the Human Resource Director who said someone had complained to Equal Employment staff about the item on his desk. He was not told the identity of the complainer. He did not learn the identity of the complainer until the date of the hearing. Accordingly, to the extent Grievant engaged in a protected activity, there was no causal link between that activity and the disciplinary action taken against him. The Hearing Officer finds that the Agency did not retaliate against Grievant by issuing him 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 removal 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:

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<sup>11</sup> See Va. Code § 2.2-3004(A)(v). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

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 14<sup>th</sup> St., 12<sup>th</sup> 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 all of your appeals to the other party and to the EDR Director. 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.<sup>12</sup>

[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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.

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

Hearing Officer