

Issues: Group II Written Notice with termination (due to accumulation) (leaving the worksite without permission), and Group III Written Notice with termination (leaving the worksite without permission and threatening another employee); Hearing Date: 06/19/06; Decision Issued: 07/06/06; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8346/8347; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8346 / 8347

Hearing Date: June 19, 2006
Decision Issued: July 6, 2006

PROCEDURAL HISTORY

On March 16, 2006, Grievant C was issued a Group II Written Notice of disciplinary action for leaving the work site during work hours without permission. He was removed from employment based on the accumulation of disciplinary action. On March 16, 2006, Grievant K was issued a Group III Written Notice of disciplinary action with removal for leaving the work site during work hours without permission and for verbally threatening and intimidating another employee.

On March 16, 2006, Grievant C and Grievant K timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievants and each one requested a hearing. On May 16, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 19, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant C
Grievant K
Grievant's Counsel
Agency Party Designee

Agency Representative
Witnesses

ISSUE

1. Whether Grievants 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 C and Grievant K as transportation operators at one of its area headquarters. Their regular work hours were from 8 a.m. until 4:30 p.m. Grievant C had been employed by the Agency for approximately six years and Grievant K had been employed by the Agency for approximately two years until their removal effective March 16, 2006.

Grievant C had prior active disciplinary action. On August 27, 2003, Grievant C received a Group II Written Notice.¹ He was removed from employment based on the accumulation of disciplinary action. No evidence of prior disciplinary action against Grievant K was presented during the hearing.

¹ Agency Exhibit 4.

A railroad company needed to make repairs in an area where roads carried traffic through the area. The Agency decided to close several roads and block vehicle access into the repair area. Numerous concrete barriers were placed along a route to prevent vehicles from the roadway from driving into the work site. Agency employees were placed at each end of the barricade to ensure that vehicle drivers did not circumvent the barricade and enter the work zone. Employees at one end of the barricade were approximately three tenths of a mile from the employees at the other end.

The Agency's area headquarters is located approximately two to three miles from the barricade. An employee could drive between the barricade and the area headquarters in five to ten minutes.

On March 9, 2006, Grievant C and Grievant K were assigned to work at one end of the barricade. Grievant C obtained the keys to a dump truck and drove it to the barricade. Grievant K obtained the keys to a smaller truck and took it to the barricade. They parked the dump truck behind the barricade and watched for traffic. Traffic signs had been placed in the outside perimeter of the work zone, so few vehicles drove near the barricade.

At approximately 3 p.m., Agency managers realized that they would need VDOT employees to maintain the barricade after normal work hours because the railroad company had not completed its work. Grievant C and Grievant K were called and asked if they wished to work overtime. They declined because they had other commitments. Mr. S and Mr. M volunteered to work overtime and to relieve Grievant C and Grievant K.

Mr. S and Mr. M left the area headquarters at approximately 4 p.m. to travel to the barricade. The barricade had employees at both ends and the distance between them was lengthy. Mr. S and Mr. M did not know at which end of the barricade Grievant K and Grievant C were working. They traveled to the road near the barricade and turned in the direction of the barricade where Grievant C and Grievant K were not working. Grievant C and Grievant K observed the VDOT vehicle from a distance and saw it turn the wrong way. They did not call on the radio to the vehicle because they mistakenly believed they had to know the truck number before attempting to call the truck on the radio. They decided to leave the barricade and attempt to locate their relief crew. They left the dump truck with the keys inside at the barricade in case one of the relief crew members needed to return to headquarters. Grievant C and Grievant K entered the smaller truck and drove in the direction of the VDOT truck they believed contained the relief crew. Once they realized they could not find the VDOT truck, they decided to return to the area headquarters instead of returning to the barricade. They did so because the hour was approaching the end of their shifts at 4:30 p.m. and they wished to leave work on time. They returned to the area headquarters at approximately 4:20 p.m. Grievant C approached another supervisor and explained what had happened.

While Grievant C and Grievant K were attempting to locate the VDOT truck, Mr. S and Mr. M reached the other end of the barricade. They were told they could find Grievant C and Grievant K at the other end of the barricade, so they traveled to where Grievant C and Grievant K should have been working. Once Mr. S and Mr. M arrived at the other side of the barricade at approximately 4:10 p.m., they were surprised that Grievant C and Grievant K were absent and that the keys to the dump truck were left inside the vehicle. The Agency's customary procedure was that an employee must remain at his work site until relieved by another employee. Mr. M was concerned that Grievant C and Grievant K had acted improperly and decided he would report the matter to the Supervisor on the following day. Mr. M felt it was his duty to report a safety violation. The volunteer crew worked until approximately 6:30 p.m. or 7 p.m. that night.

On March 10, 2006 at approximately 7:40 a.m., Grievant K was sitting at a desk approximately 15 to 20 feet from the Supervisor's office door. Mr. M drafted a statement and wanted to present it to the Supervisor. Mr. M attempted to have Mr. S also sign the statement, but Mr. S refused. Mr. S informed Grievant of what Mr. M was attempting to do. Mr. M was standing near the doorway to the Supervisor's office. Grievant K asked Mr. M what was going on. Mr. M responded, "It's out of my hands." At approximately 7:55 a.m., Grievant K said to Mr. M in an angry and loud tone words to the effect of "Are you the VDOT Police?", "You are not going to take mother f--cking food off my table", and "If you are trying to start problems for me, there would be trouble."² The Supervisor heard Grievant's K's statement and came out of his office to address Grievant K. The Supervisor said "I don't want to hear this in my office." Grievant K replied, if he did not want to hear it, then he should go back in his office and shut the door.

Mr. M did not like hearing Grievant K's comments to him but did not feel threatened. Mr. M was described as a "by the book" type employee who was also sometimes argumentative but did not take disagreements personally. When the argument was over, Grievant K and Mr. M shook hands. Mr. M felt it could work with Grievant K.

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

² Grievant K testified that he told Mr. M, "If you are going to cause food to come off my table, it's going to cause me problems." In his written statement, however, Grievant K describe his statement as, "I then told [Mr. M] that if he was trying to start problems for me that there would be trouble." Grievant K's written statement more closely resembles the testimony of others who heard Grievant K's comments. Grievant K's contention that he said "it's going to cause problems for me" is not supported by credible evidence.

force.” DHRM § 1.60(V)(B).³ 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).

Leaving the Work site

“Leaving the work site during work hours without permission” is a Group II offense.⁴ Grievants were assigned to work at the barricade. The barricade was their work site. They knew or should have known that in order to leave the barricade, they first had to be relieved by other employees. Both Grievants left the work site without obtaining permission from a supervisor to do so. They did not have the discretion to independently determine whether to remain or leave the work site. Accordingly, the Agency has presented sufficient facts to support its allegation that Grievant K left the work site without permission. The Agency has presented sufficient evidence to support its issuance to Grievant C of a Group II Written Notice. Grievant C had a prior active Group II Written Notice. Upon the issuance of the Group II Written Notice giving rise to this appeal, the Agency has established that it may remove Grievant C from employment based on the accumulation of disciplinary action.

Workplace Violence

Workplace violence is defined as:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, an intimidating presence, and harassment of any nature such as stalking, shouting or swearing.

“Prohibited conduct includes, but is not limited to:

- engaging in behavior that creates a reasonable fear of injury to another person; ***
- threatening to injure an individual or to damage property;”⁵

³ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁴ DHRM Policy 1.60(V)(B)(2)(c).

⁵ DHRM Policy 1.80, *Workplace Violence*.

Grievant K threatened to cause Mr. M “trouble” if Mr. M started “problems” for Grievant K.⁶ Grievant K knew that Mr. M was causing “problems” for Grievant K because Mr. M was in the process of reporting Grievant K’s behavior to the Supervisor. Although Grievant K did not expressly threaten physical injury to Mr. M, the word “trouble” could have included many things ranging from physical injury to a disruption of their working relationship at the workplace. In any event, Grievant K’s comment is of the type prohibited by the workplace violence policy.⁷ Accordingly, the Agency has presented sufficient evidence to support its issuance of disciplinary action.

Violation of the Workplace Violence policy can be a Group I, II, or III offense. In this case, the Assistant Residency Administrator concluded Grievant K should receive a Group III Written Notice because Grievant K threatened an employee who was reporting a safety violation. The Agency’s analysis as to the level of disciplinary action is reasonable and within its management discretion. Accordingly, the Agency has presented sufficient evidence to support its issuance to Grievant K of a Group III Written Notice with removal.

Retaliation

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;⁸ (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.

⁶ The precise word selection Grievant K used varies by witness. For example, the Supervisor described Grievant K’s phrase as “going to have some F***** problems.” Another supervisor described Grievant K’s phrase as “there would be (explicit language) trouble.” See Grievant Exhibit 2.

⁷ Grievant K’s conduct may not precisely meet any of the bulleted items listed in the policy, but the prohibited conduct is not limited to the bulleted items listed. Grievant K’s behavior was similar to threatening to injure an individual except the nature of the threat was not precisely defined.

⁸ 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.

Grievants contend the Agency took retaliatory action against them because they did not support⁹ the religious activities coordinated by a supervisor within their Facility. The evidence, however, showed that, Mr. Mo, the supervisor who initiated the religious activities, did not participate in the disciplinary action. He did not make any of the decisions regarding whether the Grievants should be disciplined and what level of disciplinary they should received.¹⁰ Accordingly, Grievants have not established a connection between their resistance to the religious activities and the disciplinary action. The Agency did not take disciplinary action against Grievants in order to retaliate against them.

Mitigation

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....”¹¹ 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.”

Grievants contend the disciplinary action should be mitigated because (1) they left the work site with the intent of finding their replacements, (2) the dump truck remained unattended only for approximately five to ten minutes, and (3) the risk to the Department of having the truck was *de minimis* given the location of the work site and the limited opportunity for anyone to steal. Grievants’ arguments fail. Although Grievants may have left the work site with the intent to find their replacements, they did not return to the work site and instead returned to the area headquarters without knowing whether their replacements had taken over the work site. It is not necessary for the Agency to show it suffered damage because of Grievants failure to comply with policy. Whether five minutes of exposure to theft is a sufficient amount of time to justify taking disciplinary action is within the Agency’s discretion.

Grievant K contends the disciplinary action should be mitigated because (1) Mr. M’s personality was combative in nature and he was accustomed to arguing with other

⁹ Both Grievants attended the religious meetings a few times but did not actively support the activity.

¹⁰ The Assistant Residency Administrator decided the level of discipline to issue after discussing the matter with human resource staff and his supervisor. Mr. Mo presented facts to the Assistant Residency Administrator but did not make a recommendation regarding what disciplinary action to take.

¹¹ *Va. Code § 2.2-3005.*

employees, (2) Mr. M did not feel threatened by Grievant K's comments, and (3) Grievant K and Mr. M made amends after the argument and retained their working relationship. Grievant K's argument fails because it is not necessary for the Agency to show that Mr. M felt threatened in order to show a policy violation. Although Grievant's reconciliation with Mr. M speaks favorably of Grievant K, the *Rules for Conducting Grievance Hearings* do not authorize the Hearing Officer to disregard inappropriate behavior because a grievant has minimized the impact of his behavior.

In light of the standard set forth in the *Rules for Conducting Grievance Hearings*, 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 C of a Group II Written Notice of disciplinary action with removal based on the accumulation of disciplinary action is **upheld**. The Agency's issuance to Grievant K of a Group III 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:

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 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.¹²

[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

Carl Wilson Schmidt, Esq.
Hearing Officer

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