

Issue: Group II Written Notice (failure to report to work as scheduled without proper notification); Hearing Date: 08/11/06; Decision Issued: 08/14/06; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8391; Outcome: Agency upheld in full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8391**

Hearing Date: August 11, 2006  
Decision Issued: August 14, 2006

**PROCEDURAL HISTORY**

On April 26, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to report to work as scheduled without proper notice to supervision. On May 2, 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 July 19, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 11, 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 employs Grievant as an Electrician Senior. He is a licensed/certified electrician. The purpose of his position is:

Maintain and repair all electrical/mechanical equipment systems at [the Facility]. Performs other duties as assigned. This position is designated as Essential Personnel.<sup>1</sup>

On April 11, 2006, the Immediate Supervisor notified Grievant and a Temporary Employee that they were scheduled to work from 7:30 p.m. until 5:30 a.m. on April 17, 18, 19, and 20, 2006.<sup>2</sup> Grievant expressed his concern about working a ten hour night shift. The Senior Supervisor met with his supervisor and they decided to change the planned work schedule. Instead of having Grievant work four night shifts, Grievant would work his regular eight hour shift beginning at 7:00 a.m. and ending at 3:30 p.m. Grievant would then return to work at 7:30 p.m. and work until 11:30 p.m. In effect, Grievant would work 12 hours in the day on April 17, April 18, and April 19, but his

---

<sup>1</sup> Agency Exhibit 8.

<sup>2</sup> On April 12, 2006, the Superintendent sent an email to several employees notifying them of the planned lane closures so that the work could be performed. See, Agency Exhibit 4.

hours for the remainder of the week would be altered to adjust his total hours for the week to 40. On Friday, April 14, 2006, the Senior Supervisor informed Grievant of the schedule change. The Senior Supervisor also called the superintendent of the residency where the Temporary Employee worked<sup>3</sup> and asked that the Temporary Employee be notified of the schedule change.

Grievant planned a day trip to Washington D.C. to visit his family. He did not know how long the trip would take and knew that traffic returning from Washington D.C. could be hectic.

On Monday, April 17, 2006, the Senior Supervisor reminded Grievant of the scheduled night work for the week. The Senior Supervisor also informed Grievant that the four hour night work for Monday, April 17, 2006 would be cancelled because of rain. Grievant said he wanted to take off from work on April 18, 2006 to visit his family in Washington D.C. The Senior Supervisor reminded Grievant that the work scheduled for April 18, 2006 would be completed as planned.

In the morning of April 18, 2006, Grievant called the Senior Supervisor and asked to be off from work. The Senior Supervisor granted Grievant's request. The Senior Supervisor believed Grievant was asking only to be absent from work during his normal eight hour shift. Grievant did not specify that he would not be able to work the evening shift. Grievant did not yet know whether he would be returning from his trip to be able to arrive at work as scheduled for the night shift.

The Agency planned a tunnel lighting project for the evening of Tuesday, April 18, 2006. Grievant's participation in the work was essential. At 7 p.m., employees from Another Residency began setting out cones along the roadway to block off traffic lanes so that lighting work could begin. The Temporary Employee arrived to work that evening as scheduled. Grievant did not report to work. Grievant did not call anyone in advance to notify the Agency that he was not able to work on April 18, 2006 beginning at 7:30 p.m. as scheduled. The Agency cancelled the lighting work planned for that night because Grievant did not arrive for work. The employees who arrived to work as scheduled were assigned other duties. The Agency incurred expenses that it would not otherwise have incurred had the lighting project proceeded as planned.

## **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

---

<sup>3</sup> Grievant and the Temporary Employee did not work in the same residency. The Temporary Employee was being reassigned to assist Grievant.

force.” DHRM § 1.60(V)(B).<sup>4</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 report to work as scheduled without proper notice to supervisor(s)” is a Group II offense.<sup>5</sup> Grievant was scheduled to work on April 18, 2006 from 7:30 p.m. until 11:30 p.m. Grievant did not report to work as scheduled. Grievant did not notify the Supervisor prior to the beginning of his shift. Accordingly, the Agency has presented sufficient evidence to support its issuance of a Group II Written Notice.

### 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....”<sup>6</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.”

Grievant contends the disciplinary action should be mitigated because of his miscommunication with the Senior Supervisor. Grievant’s argument fails because to the extent there was miscommunication, Grievant was the source of the miscommunication. Grievant informed the Senior Supervisor that he may want to take the day off on April 18, 2006 and contends he said he “may not be coming into work that night depending on traffic returning from Washington D.C.” Grievant said he would “try” to make it back for the night shift. On April 18, 2006, Grievant called the Senior Supervisor and said he wanted to take the day off to visit his family. Grievant’s leave was approved for eight hours. Grievant did not tell the Senior Supervisor that he could not work the 4 hour shift scheduled for that night. Grievant’s previous comment that he “may” not be able to work the night shift remained the only comments he had made about the night shift. Saying one “may” not be able to work as scheduled is significantly different from saying one “cannot” or “will not” work. Grievant expected the Senior Supervisor to assume that

---

<sup>4</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>5</sup> DHRM Policy 1.60(V)(B)(2)(d).

<sup>6</sup> *Va. Code § 2.2-3005.*

because Grievant had asked to be away during the schedule day shift, Grievant was also asking to be away during the night shift. Grievant could have eliminated any confusion by saying he did not intend to work the night shift.<sup>7</sup>

### 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;<sup>8</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 Senior Supervisor took disciplinary action against him because he had engaged in protected activities. Assuming for the sake of argument that Grievant engaged in a prior protected activity, Grievant has not presented any credible evidence to show that he was disciplined because of that protected activity. The evidence showed that the Agency took disciplinary action against Grievant because he failed to report to work as scheduled without giving prior notice to a supervisor. The Agency did not retaliate against Grievant.

### **DECISION**

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

### **APPEAL RIGHTS**

---

<sup>7</sup> The Senior Supervisor believed Grievant would be arriving at work at 7:30 p.m. on April 18, 2006 as scheduled. If he had believed Grievant would not be coming to work, he would have cancelled the lighting project and avoided scheduling several employees to work that night.

<sup>8</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.

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 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>9</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].

---

<sup>9</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

*S/Carl Wilson Schmidt*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer