

Issues: Group I Written Notice (unsatisfactory work performance) and Group II Written Notice with termination (due to accumulation) (workplace violence); Hearing Date: 08/28/06; Decision Issued: 08/31/06; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8401; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8401

Hearing Date: August 29, 2006
Decision Issued: August 31, 2006

PROCEDURAL HISTORY

On March 24, 2006, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance. He was also issued a Group II Written Notice of disciplinary action for workplace violence with removal. On April 24, 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 27, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 29, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
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 a Transportation Operator II at one of its Facilities. He began working for the Agency in July 2000 until his removal effective March 24, 2006. The purpose of his position was:

Perform roadway maintenance by reporting all unsafe matters to supervision, operating light, medium and heavy-duty equipment and repair and maintain the interstate system in [region]. Assist in overseeing the activities of contractors performing maintenance activities on Interstate system.¹

Grievant had prior active disciplinary action consisting of a Group I Written Notice issued on June 16, 2005, Group I Written Notice issued on June 20, 2005, and Group II Written Notice issued on October 6, 2005,

On February 8, 2006, approximately five Facility employees including Grievant were involved in a mobile pothole patching operation. They met for a safety meeting at the beginning of their shift. Each was told the objective and location of the project.

¹ Agency Exhibit 4.

In order to begin the operation, five vehicles were parked in line formation in the left shoulder of the highway to be maintained. Several of the trucks had crash-cushions designed to protect against oncoming traffic hitting the rear of the trucks. All five vehicles began moving forward at the same time at a rate of speed significantly below the speed limit. The fifth truck towards the rear, stayed in the left shoulder. The fourth truck towards the rear began driving over the line separating the shoulder and the left lane of the highway. The third truck towards the rear began driving in the left lane. Grievant was operating the third truck from the rear. The purpose of these three trucks was to provide a barrier preventing oncoming traffic from entering the work zone where the front two vehicles would be involved in repairing the road surface in the left lane.

Drivers of the trucks communicated by radio. Grievant began a conversation with the driver of the fourth truck while the driver of the fourth truck was already speaking with another driver. Grievant was advising the driver to return to his position, but the driver believed he was in the correct position. During the course of their conversation, Grievant became distracted. He failed to follow the truck in front of him to the correct destination. Instead, he drove off of an exit ramp placing him in the wrong destination. One of the other drivers noticed Grievant leaving the procession and called for the other trucks to pull to the shoulder of the road to enable Grievant's truck to return to the group. After approximately fifteen minutes, Grievant was able to return to the group and they continued to the intended location.

On February 22, 2006, Grievant became angry and expressed his anger to two employees. Grievant said "if I lose my job I will come to [the headquarters] and shoot every mother f—cker here." Grievant also told Mr. DC that, "if [Mr. JB] was to walk under a spreader that something could happen or around a piece of equipment that something could happen".²

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).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).

² Agency Exhibit 6.

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

Group I

“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 was driving a truck in a procession of vehicles when he became distracted and drove his vehicle off the highway using the wrong exit ramp. Grievant should have paid attention to the vehicles in front of him as well as the trucks behind him while driving. By exiting the highway at the wrong location, Grievant delayed the Agency’s operation by approximately fifteen minutes. Grievant’s behavior was unsatisfactory to the Agency. Grievant was supposed to remain in position until the job was completed. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group I Written Notice for unsatisfactory work performance.

Grievant argues that he had to leave the procession because of safety concerns. He contends that other traffic prohibited him from traveling to the correct location. The driver of the fourth truck testified, however, that road traffic was not so severe as to cause Grievant to leave the procession.

Grievant argues that he lost sight of the trucks in front of him because they had proceeded over a hill. The driver of the front truck testified that he had not yet passed over the hill when he heard someone say on the radio that the group had “lost a truck”. He pulled to the shoulder of the highway and observed Grievant drive his truck onto the exit ramp and off the highway at the incorrect location.

Group II

“Failure to ... comply with established written policy” is a Group II offense.⁴ DHRM Policy 1.80 sets for the Commonwealth’s policy regarding workplace violence.⁵ 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

DHRM Policy 1.80 expressly prohibits “threatening to injure an individual” Grievant threatened to shoot another employee and suggested he would increase the chances of

⁴ DHRM § 1.60(V)(B)(2)(a).

⁵ The Agency has adopted its own policy that is consistent with DHRM Policy 1.80.

injury to another employee working near Agency equipment. Grievant's behavior was contrary to DHRM Policy 1.80. By acting contrary to DHRM Policy 1.80 Grievant justified the Agency's issuance to him of a Group II Written Notice. Based on the accumulation of prior active disciplinary action, Grievant's remove from employment must be upheld.⁶

Grievant contends he did not make the comments alleged of him. The testimony of the Agency's witnesses was credible. Based on the evidence presented⁷, the Agency has shown by a preponderance of the evidence that Grievant threatened to shoot employees and cause injury to another employee working with Agency equipment.

Mitigation

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...."⁸ 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 I Written Notice of disciplinary action is **upheld**. The Agency issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

⁶ The accumulation of two active Group II Written Notices is sufficient to support an employee's removal from employment.

⁷ Grievant did not call any witnesses.

⁸ *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 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.⁹

[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].

⁹ 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