

Issue: Group II Written Notice (failure to follow established written policy); Hearing Date: 10/27/06; Decision Issued: 11/20/06; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8425; Outcome: Agency upheld in full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8425**

Hearing Date: October 27, 2006  
Decision Issued: November 20, 2006

**PROCEDURAL HISTORY**

On June 30, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow established written policy. On July 13, 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 September 27, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 27, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
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 Coin Counting Supervisor at one of its toll facilities. The purpose of his position was:

The position is responsible for all cash operations on the Dulles Toll Road, including operating the Cash Office and supervising the Coin Counting functions. This includes accounting for large amounts of cash (\$113,000.00), ensuring that cash is accounted for with the prescribed procedures, ensuring that deposits are made daily, that the appropriate paperwork is completed so that a cash audit can be performed. Position is also responsible for ensuring that Toll Collections and cash counting equipment is operating correctly and coordinating its repairs with vendors.<sup>1</sup>

On September 15, 2005, Grievant signed a document acknowledging receipt of "Security Procedures for Coin Counting Area." This procedure required:

Strict security of the entire Coin Counting/Vault areas, and State Funds contained therein, shall be maintained at all times.

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<sup>1</sup> Agency Exhibit B4.

Keep all doors (including Coin Supervisor[s] area, Coin Counting area and Sally Port doors) locked all the time.<sup>2</sup>

Grievant worked as part of the Agency's coin counting operation. He worked in a brick building with a security guard at the front of the building to determine who could enter the building. While the Agency renovated part of the brick building, it moved the coin counting operation into a temporary compound with several temporary trailers and structures. Grievant began working in the coin counting trailer.

The trailer was placed with one end at the east and another end towards the west. The trailer had two doors facing south. One door was on the west side and one was on the east side. A peep hole was installed on the east side door in January 2006. Both doors would be locked when closed.<sup>3</sup>

On the south side of the trailer were three windows. One window was towards the west side, one was in the middle and one was closer to the east side. Vertical bars prevented entry through glass windows.

Inside the trailer was a wall dividing the east and west sides of the trailer. A counter-space and lockable sliding glass window allowed employees on the west side to speak with an employee on the east side.

When toll collectors finished their shifts, they would take their trays of money to the west side of the trailer. Since they did not have keys to the west side, they had to rely on someone else to open the door for them to gain entry. Once inside the trailer, toll collectors could store their trays in storage vaults for which they had unique keys to open. Once inside the west side of the trailer, toll collectors could speak through the partition window to the supervisor on the east side of the trailer and exchange monies as necessary. Monies on the east side of the trailer were often unsecured while they were being counted or exchanged. Grievant worked behind a locked door on the east side of the trailer.

On March 30, 2006 Grievant was working in the trailer. The shifts of approximately six toll collectors were scheduled to end at 8:15 p.m.<sup>4</sup> Grievant walked out of the east side door and went to the west side door. At 7:30 p.m., he unlocked the door and left it unlocked so that the toll collectors would gain entry to the west side of the trailer.

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<sup>2</sup> Agency Exhibit C3.

<sup>3</sup> Inside the trailer over the west door appeared a sign saying that the door should remain open at all times. The sign came with the trailer and all supervisors including Grievant knew the sign was not to be followed.

<sup>4</sup> According to the Contractor Coordinator, the six toll collectors typically worked from 2:15 p.m. until 8:15 p.m.

Prior to 7:55 p.m. on March 30, 2006, Grievant left his trailer and went to the trailer where the Deputy Director was working. Grievant banged on the trailer door and called the Deputy Director's name. When the Deputy Director let Grievant inside the trailer Grievant told the Deputy Director that Grievant had been robbed. Grievant said that at approximately 7:45 p.m. an armed robber entered the west side door to the trailer and pointed his gun at Grievant on the east side. The gunman told Grievant to open the door on the east side. Grievant complied. A second man with a gun and suitcase entered the east side of the trailer. He took money and placed it in the suitcase. Grievant was instructed not to move while the robbers left the trailer. They took Grievant's personal and State issued cell phones and a set of keys.

The Deputy Director called the local police. The Agency later determined that \$8,399 was missing on March 30, 2006.

At approximately 7:55 p.m., the Contract Coordinator arrived at the compound. None of the six toll collectors had arrived at the trailer.<sup>5</sup> The Contract Coordinator was responsible for supervising the toll collectors. Neither the Contract Coordinator, nor the toll collectors were State employees.

## 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).<sup>6</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>7</sup> VDOT Policy 3.15, *Handling and Security of Monies*, was adopted by the Agency to "provide detailed instructions for the accurate accounting for all monies collected in the vaults." Section G of the policy provides, "All doors must be kept locked at all times."<sup>8</sup> At 7:30 p.m., Grievant left the door to the west side of the trailer unlocked. Accordingly, Grievant

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<sup>5</sup> The six toll collectors worked six hour shifts to substitute for other toll collectors while those toll collectors took meal breaks.

<sup>6</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>7</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>8</sup> Agency Exhibit B1. This policy is not correctly numbered/lettered.

acted contrary to established written policy thereby justifying the 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>9</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 argues the disciplinary action should be mitigated. Grievant argues that other supervisors routinely left the west side door unlocked. Grievant presented evidence of other employees who testified that the door to the coin counting area was left unlocked in the main brick building.

When the testimony of witnesses conflicts, the Hearing Officer must determine which testimony is most credible. In this case, the most credible witness regarding the practice of unlocking doors was the Contract Coordinator. The Contract Coordinator had served in her position for three years including the time period when coin counting operations were moved to the trailer until Grievant reported being robbed. She worked four days per week with two of those days falling on days Grievant worked. She was familiar with the practice of Grievant and three other employees holding positions similar to Grievant’s position.

Under the customary practice, she would arrive at the coin counting trailer at approximately 7:55 p.m. She tried to arrive just prior to when the toll collectors began arriving at the trailer. The toll collectors were scheduled to leave the toll booths at 8 p.m. and expected to arrive at the trailer prior to the end of their shifts at 8:15 p.m.

The Contract Coordinator did not have a key to the west side of the trailer. When she arrived she would ask one of the four supervisors including Grievant to let her into the west side of the trailer. She would wait inside the trailer until the toll collectors arrived. She would let the toll collectors inside the trailer.

Grievant contends he left the west door open in order to permit toll collectors changing shifts to have ready access to the area where they stored their trays. He

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<sup>9</sup> *Va. Code § 2.2-3005.*

asserts that if he had not done so, he would have been interrupted so often by toll collectors seeking admittance to the west side that he would have been unable to perform his duties. This argument fails because a Contract Coordinator usually was the first person to arrive at the west side to gain admittance. Once inside the west side of the trailer, the Contract Coordinator would assume responsibility for opening the door to permit Toll Collectors inside. In most circumstances, Grievant would have to unlock the west side door one time – when the Contract Coordinator first arrived.

Grievant contends he and the other supervisors usually left the west side door unlocked. The Contract Coordinator's testimony directly contradicted this assertion. The usual practice at the trailer was for the Contract Coordinator to arrive at the trailer and find the west side door locked. She would then ask Grievant or another supervisor on the east side of the trailer to unlock the west side to let her into the west side. Based on the Contract Coordinator's testimony, it does not appear that the Agency disregarded its written policy requiring doors to be locked.

Another problem with Grievant's assertion is that he opened the door too early, namely at 7:30 p.m. This was well in advance of when he would expect the Contract Coordinator to arrive at approximately 7:55 p.m. Why Grievant would leave the door unlocked for an additional 25 minutes has not been explained.

Grievant argues the policy did not apply once coin counting operations moved to the trailer. This argument fails. Some of the functions governed by the policy remained in the brick building. The coin counting operation was secured by doors when it was located in the brick building and the function was also secured by a door once it was moved to the trailer. Thus, moving the function did not eliminate the necessity to keep a door locked.<sup>10</sup>

Grievant contends the robbery would have occurred even if he had locked the west side door. It is not necessary for the Agency to show that the robbery would not have otherwise occurred had Grievant complied with the policy. It is only necessary for the Agency to show that the policy was not followed.

There is no basis to mitigate the disciplinary action 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**.

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<sup>10</sup> The Hearing Officer gives greater weight to the practice at the trailer than the practice at the brick building. The practice of locking the west side door at the trailer was clearly explained by the Contract Coordinator. The practice at the brick building was less clear and not as significant as the actual practice where Grievant was working on March 30, 2006.

## 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 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>11</sup>

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<sup>11</sup> 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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer