

Issues: Group II Written Notice (failure to follow instructions and violating safety rule), and Group I Written Notice (disruptive behavior); Hearing Date: 01/22/07; Decision Issued: 03/01/07; Agency: Department of Transportation; AHO: Carl Wilson Schmidt, Esq.; Case No. 8502/8503; Outcome: Group II – No relief, agency upheld in full. Group I – No relief, agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8502 / 8503

Hearing Date: January 22, 2007
Decision Issued: March 1, 2007

PROCEDURAL HISTORY

On June 30, 2006, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions and violating a safety rule. On July 11, 2006, Grievant was issued a Group I Written Notice of disciplinary action for engaging in disruptive behavior. Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. The Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 22, 2007, 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 Notices?
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 actions, 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 actions against the Grievant were 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 Administrative and Office Specialist II. The purpose of her position is:

Responsible for the filing maintaining, retrieval and disposition of a wide range of records. Accurately files, retrieves records, and performs file maintenance functions in accordance with established procedures and practices.¹

She has been employed by the Agency for approximately 22 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency has a room with many rows of shelves to hold files. The shelves are approximately 8 feet tall and can be moved from side to side in order to create an aisle through which an employee can walk. Grievant was responsible for maintaining the records in several shelves. Other employees were responsible for maintaining records held in other shelves in the record room. If an employee returned to her desk after working in the stacks but left a table in an aisle between shelves, the table would

¹ Agency Exhibit 2.

prevent another employee from pushing together the shelves on each side of the table. If the table prevented the two shelves from being pushed together, an aisle in another part of the record room stacks may not be created. Thus, an employee responsible for records in one part of the stacks may have to walk to another part of the stacks and remove the table in order to create a new aisle.

On June 12, 2006, the Office Manager wrote a memorandum to Grievant stating:

On 11/9/05 I had a staff meeting to remind and inform you that all supplies and equipment used to perform job duties were the property of VDOT and not your personal items, yet you continue to hoard the filing tables to prevent usage from fellow employees. Also, on 6/6/06, file folders were left in the aisle (your section), which is a safety violation and it caused delay in performing and pulling a request for a waiting customer.

This kind of conduct will not be tolerated. This memo serves as a written memorandum and further disruptions will be handled under the "Standards of Conduct."²

When Grievant was not filing records, she worked at her desk. Her desk is located a few feet in front of the desks of Ms. J and Ms. SW.

On June 23, 2006, Grievant and Ms. W³ were working in the part of the record room containing files assigned to Grievant. Grievant used a table to assist her with filing. In the afternoon, Grievant and Ms. W finished working in the stacks and walked away. A table remained in between two of the shelves where they were working. A short time later, Ms. J walked to the stacks to file records. She observed folders and a box on a table several feet down in between two shelves where Grievant and Ms. W had been working. Ms. J immediately spoke to Ms. SW about what she observed. Ms. SW walked to Grievant's file area and observed the table and folders between the shelves. Ms. J contacted the Office Manager but the Office Manager was too busy to go to the stacks immediately. Grievant remained in the workplace at the time Ms. J and Ms. SW observed the table in the stacks and at the time Ms. J sought the Office Manager's attention. Grievant later left the workplace for the day.

On June 30, 2006, Grievant met with the Office Manager who provided Grievant with a memorandum stating that:

I am considering issuing you a Group II Written Notice for Failure to Follow a Supervisor's Instruction and Safety Violation. *** Specifically, you left

² Agency Exhibit 4.

³ Ms. W reported to Grievant.

boxes of files, table and bar stool in the aisle of the filing stacks on 6/23/06
....⁴

Grievant became angry and remained angry when she returned to her desk. Grievant knew or should have known that Ms. J and Ms. SW were seated at their desks behind Grievant. Ms. J and Ms. SW knew that Grievant came from a meeting with the Office Manager. While standing at her desk, Grievant said loudly, "I'm going to take her house." Grievant said this several times. Grievant added, "I don't want to live there. I'll sell it because I want a Cadillac."⁵ Grievant was referring to filing a lawsuit. Although Grievant did not mention the Office Manager's name, it is more likely than not that Grievant was referring to the Office Manager.⁶

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).⁷ 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" is a Group II offense.⁸ On June 12, 2006, Grievant was instructed by the Office Manager, a supervisor, not to leave items between shelves in the record room. On June 23, 2006, Grievant used a table to file records within her assigned area and then left that area leaving a table between the shelves.⁹ Grievant failed to follow a supervisor's instructions thereby justifying the issuance to her of a Group II Written Notice.¹⁰

⁴ Agency Exhibit 7.

⁵ Agency Exhibit 9.

⁶ Grievant was most likely referring to the Office Manager because she had just left a meeting with the Office Manager and was angry at the Office Manager. Grievant did not establish the identity of another person with whom she would have a basis to take legal action against.

⁷ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁸ DHRM § 1.60(V)(B)(2)(a).

⁹ Grievant did not leave the record room for a short period of time with the intent to return. Grievant had finished her work for the day in the record room and intended to leave the workplace shortly after leaving the record room.

¹⁰ The Agency did not establish that Grievant violated a safety rule. Although Grievant did not violate a safety rule, there remains sufficient evidence to support the issuance of a Group II Written Notice.

Grievant contends Ms. J placed the table in the aisle in order to get Grievant in trouble. The evidence does not support this conclusion for two reasons. First, Ms. J's testimony was credible. Second, Grievant had a pattern of leaving items in between the shelves which resulted in her being counseled prior to June 23, 2006. What happened on June 23, 2006 was consistent with Grievant's prior actions.

"Disruptive behavior" is a Group I offense.¹¹ Grievant was not engaging in a private discussion with friends on June 30, 2006. She was loudly announcing that she intended to harm financially her supervisor who was also the supervisor of Ms. J and Ms. SW. Grievant's comments were upsetting to and not well-received by Ms. J and Ms. SW. Grievant knew or should have known that Ms. J and Ms. SW would find Grievant's comments upsetting.¹² The Agency has presented sufficient evidence to support its issuance to Grievant of a Group I Written Notice.

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;¹³ (2) suffered a materially adverse action; and (3) a causal link exists between the adverse 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 her for successfully pursuing a prior grievance. Grievant's defense fails because no evidence was presented showing that the Office Manager¹⁴ knew or should have known of Grievant's prior grievance. No credible evidence was presented to show that Agency Managers acted against Grievant

¹¹ DHRM Policy 1.60(V)(B)(1)(e).

¹² Grievant and Ms. J and Ms. SW did not like one another and minimized communications unrelated to their work duties.

¹³ 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.

¹⁴ The decision to take disciplinary action against Grievant resulted primarily from the decision-making of the Office Manager.

because she may have engaged in any protected activity. There is ample evidence to show that the Agency took disciplinary action against Grievant because it believed she failed to follow a supervisor's instructions and engaged in disruptive behavior.

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...."¹⁵ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated. In particular, Grievant argues that her Group II Written Notice should be reduced because the Group II Written Notice originally issued to Ms. W for the same behavior was reduced to a Group I Written Notice during the grievance process. There is insufficient evidence for the Hearing Officer to determine why the Agency reduced the disciplinary action against Ms. W. Grievant is responsible for establishing mitigating circumstances. Thus, 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 for failure to follow a supervisor's instructions is **upheld**. The Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action for disruptive behavior 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.

¹⁵ *Va. Code § 2.2-3005.*

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.¹⁶

[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

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.