

Issue: Group II Written Notice (failure to follow established written policy); Hearing Date: 02/08/07; Decision Issued: 02/09/07; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 8516; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8516

Hearing Date: February 8, 2007
Decision Issued: February 9, 2007

PROCEDURAL HISTORY

On September 6, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow the Agency's policy requiring an employee to report being charged with a moving traffic violation. On September 18, 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 January 23, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 8, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative

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 Department of Corrections employs Grievant as a Building and Grounds Superintendent at one of its Facilities. Grievant has been working for the Department since 1997. The purpose of his position is:

Ensure that the general buildings are in compliance with all Federal, State and local codes, as well as DOC standards. Oversee maintenance, construction, and renovation projects for [the Facility].¹

He received an overall rating of Exceeds Contributor on his 2005 performance evaluation.² No evidence or prior active disciplinary action against Grievant was introduced during the hearing.

On July 25, 2006, Grievant was operating a State owned vehicle and received a traffic citation for exceeding the speed limit. He did not report the citation to his Supervisor or the Facility Warden. He asked his Supervisor's Secretary to reserve the

¹ Grievant Exhibit 1.

² Grievant Exhibit 1.

date of the trial and indicated to her that he would be attending court on that day. On August 18, 2006, as the court date was approaching, Grievant mentioned to his Supervisor that he would be away from the Facility in order to appear in Court to defend against the traffic citation he received. The Supervisor reported Grievant's comments to the Warden who reported the information to the Regional Director.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."³ Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."⁴ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁵

DOC Procedure Number 5-45.6(B) states that:

Employees charged with ... a moving traffic violation which occurs on the job or in a state vehicle, shall inform their organizational unit head immediately if received during normal working hours or the next day if received during non-working hours. The organizational unit head shall immediately notify the next management level (Regional Director, Administrator or Deputy Director).

The policy defines, "moving traffic violation" to mean "those citations received for any reason while operating a motor vehicle." The Agency interprets the policy to define the organizational unit head as the Facility Warden.

"[F]ailure to ... comply with applicable established written policy" is a Group II offense.⁶ When Grievant received a traffic citation while operating a State vehicle, he received a moving traffic violation as defined by the DOC Procedure Number 5-45. He was obligated to immediately report his receipt of a traffic citation to the Facility Warden. Grievant did not immediately report the matter to the Warden thereby acting contrary to policy. Instead, he mentioned receiving a traffic summons to his Supervisor approximately three weeks later and then the matter was reported to the Facility

³ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁶ Virginia Department of Corrections Operating Procedure 135.1(XI)(B)(1).

Warden.⁷ The Agency has presented sufficient evidence to Support its issuance to the Grievant of a Group II Written Notice.

Grievant argues he reported the matter to his Supervisor's secretary thereby informing the Agency he received a traffic citation. This argument fails because the policy required him to report the information to the organizational unit head and a secretary is not the organizational unit head.

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 *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 because he did not receive or have actual notice of the DOC Policy 5-45. This policy became effective after he began working for the Agency and does not remember being presented with the policy or receiving any training regarding the terms of the policy.

The *Rules* address mitigating circumstances and state, "an employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee." DOC Procedure Number 5-45 was readily available to Grievant through the Facility's intranet. He was familiar with how to access information on the intranet and had accessed other policies using his computer. Although Grievant did not have actual knowledge of the policy he had constructive knowledge because DOC Procedure Number 5-45 was readily available to him if he had accessed the Agency's computer system.

Grievant contends the disciplinary action should be mitigated because other employees engaging in more serious misbehavior are lightly disciplined or not disciplined at all. Grievant's argument fails because mitigating circumstances under the *Rules* for the inconsistent application of disciplinary action apply only to similarly

⁷ The Warden testified that the reason for the prompt reporting requirement is so that the information can be reported up the chain of command quickly. By failing to notify the Supervisor until approximately three weeks after receiving the citation, Grievant prevented the timely reporting of the information to Agency managers.

⁸ *Va. Code § 2.2-3005.*

situated employees. Grievant has not presented evidence showing the Agency failed to discipline employees failing to report traffic citations or engaging in similar behavior.

In light of the standard set forth in the *Rules*, 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 II Written Notice of disciplinary action 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.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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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