

Issues: Group I Written Notice (unsatisfactory job performance) and Termination (due to accumulation of Written Notices); Hearing Date: 04/30/07; Decision Issued: 05/01/07; Agency: DMHMRSAS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8587; Outcome: Agency upheld in full; **Administrative Review: DHRM Ruling Request received 05/15/07; DHRM Ruling issued 05/18/07; Outcome: HO's decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8587**

Hearing Date: April 30, 2007  
Decision Issued: May 1, 2007

**PROCEDURAL HISTORY**

On January 8, 2007, Grievant was issued a Group II Written Notice of disciplinary action. He was removed from employment based on the accumulation of disciplinary action. During the second step of the grievance process, the disciplinary action was reduced to a Group I but the removal remained.

On January 19, 2007, 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 April 5, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 30, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representatives  
Agency Party Designee  
Agency Advocates  
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 Department of Mental Health Mental Retardation and Substance Abuse services employed Grievant as a Warehouse Supervisor at one of its Facilities. He had been employed by the Agency for approximately 19 years and 3 months until his removal effective January 8, 2007. Grievant had active prior disciplinary action consisting of a Group III Written Notice issued on May 27, 2005.<sup>1</sup>

In March 2005, concern arose among some Agency employees that items were not being timely delivered from the warehouse. On March 17, 2005, the Director of Procurement, Ms. J, sent staff including Grievant an email stating, "Please be sure all lab orders are processed, received, and delivered upon receipt." Grievant replied, "In the future, we will make sure it is there as soon as it hits the door, no matter what it is."<sup>2</sup>

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<sup>1</sup> Agency Exhibit 7.

<sup>2</sup> Agency Exhibit 6.

On December 22, 2006, Grievant was working at the Agency's warehouse as part of his work shift which was scheduled to end at 12:12 p.m. State offices were closed four hours early because of a State holiday and the length of Grievant's shift had been reduced.

At approximately 11:48 a.m., a package delivery service brought five packages to the warehouse. Grievant received the packages and acknowledged his receipt of the packages to the delivery driver. Grievant's name was entered into the package delivery service tracking system as the person having received the packages. The packages were placed in the receiving area of the warehouse. Each of the packages was from a company that regularly shipped items needing immediate refrigeration upon receipt. On the side of each box appeared the company's name and the following information:

Medical Laboratory Supplies  
Refrigerate Upon Arrival (2 – 8° C)  
Do Not Freeze Perishable Expedite

Each box contained various items including lab reagents. Each box was addressed to the hospital located at the Facility.

By approximately 12:03 p.m., all of the employees other than Grievant had left the warehouse for the holiday. Grievant left the warehouse at 12:06 p.m. He closed the warehouse by locking its doors and turning out the lights. Grievant failed to notice that the boxes had to be delivered immediately to the hospital for which they were intended.

On December 24, 2006, Ms. B sought the assistance of another warehouse supervisor, Mr. S, to enter the warehouse. She wanted to look for personal items she thought she had left in the warehouse and needed for the holiday. After looking around her work area, she and Mr. S began to leave the warehouse. Ms. B noticed the five boxes. She did not know who received the boxes. She immediately placed the boxes in the warehouse refrigerator. Mr. S called his supervisor, Ms. J who left her home to travel to the warehouse and investigate the matter. Ms. J obtained the tracking numbers from four of the boxes. She did not obtain the fifth tracking number because she could not lift the box. Ms. J returned home and accessed the package delivery service tracking system to discover that Grievant had received the packages. She later obtained the tracking number of the fifth box and confirmed that Grievant also received that box. Because the boxes were not timely delivered to the hospital or immediately placed in the refrigerator, some of the box contents had to be reordered. The cost of the reordered items was \$4,720.68.

## **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>3</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).

“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’s Employee Work Profile required him to “Monitor and adhere to special storage requirement”. He was obligated to, “Assure staff accurately retrieves, affixes labels clearly identifying building, department, room number and person’s name on each package and see that the package is moved to the shipping area for delivery within a timely manner.” In addition, Grievant was expected to, “Assure delivery of incoming merchandise to the proper location in a timely manner.”<sup>4</sup> Grievant knew of his obligation to timely process perishable items from a laboratory. He acknowledged this obligation in his email of March 2005.

Grievant failed to ensure the timely delivery of the five boxes despite his obligation to do so. Because the boxes were not timely delivered or refrigerated, some of the contents in the boxes became unusable. Grievant’s work performance was inadequate or unsatisfactory because he received boxes that required immediate delivery but he failed to do so. The Agency has presented sufficient evidence to support its issuance to him of a Group I Written Notice. Because Grievant had an active Group III Written Notice, the addition of the Group I Written Notice justifies his removal from employment based on the accumulation of disciplinary action.

*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>5</sup> 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

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<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</sup> Agency Exhibit 5.

<sup>5</sup> *Va. Code § 2.2-3005.*

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. He has been honest throughout the grievance process and admits he made a “simple mistake.” Although Grievant made a simple mistake, the Agency presented sufficient evidence to support that the mistake justified the taking of disciplinary action. There is no basis to mitigate the disciplinary action.

Grievant contends he worked as a team and the Agency failed to consistently apply disciplinary action as shown by its failure to discipline other team members. This argument fails because no evidence was presented showing that other team members knew that the boxes had been delivered. No evidence was presented showing they should have known they were obligated to deliver the packages to the hospital. The Agency presented evidence, however, showing that Grievant received the boxes and was obligated to timely deliver them.

Grievant argues that several years ago employees “lost” items valued at approximately \$17,000 but were not disciplined. Insufficient evidence was presented to show that the Agency intentionally inconsistently took disciplinary action. Ms. J testified that she was not aware of the incident. It is not clear when the incident occurred and who was involved. It is also not clear whether the Agency’s managers knew of the incident. Unless Grievant can establish that Agency managers knew of the incident, there is no reason to conclude that the Agency inconsistently applied disciplinary action.

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 I Written Notice of disciplinary action is **upheld**. Grievant’s removal from employment based on the accumulation 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 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>6</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].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

