

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 06/20/07;
Decision Issued: 06/21/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8618, 8619; Outcome: Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8618 / 8619

Hearing Date: June 20, 2007
Decision Issued: June 21, 2007

PROCEDURAL HISTORY

On January 16, 2007, Grievant G was issued a Group II Written Notice of disciplinary action for failure to follow supervisor's instructions. During the Step Process, the disciplinary action was reduced to a Group I Written Notice for inadequate or unsatisfactory work performance. On January 16, 2007, Grievant F was issued a Group II Written Notice of disciplinary action for unauthorized use or misuse of State property or records. During the Step Process, the disciplinary action was reduced to a Group I Written Notice for inadequate or unsatisfactory work performance.

On February 13, 2007, Grievant G and Grievant F timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievants and each requested a hearing. The two grievances were consolidated by the EDR Director in ruling numbers 2007-1663 and 2007-1664. On May 30, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 20, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant G

Grievant F
Agency Party Designee
Agency Representative
Witnesses

ISSUE

1. Whether Grievants 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 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 employs Grievant G as a Transportation Operations Manager II. The purpose of his position is:

Administers maintenance and VDOT safety program and headquarters activities related to the maintenance program. To supervise and support highway maintenance functions by constructing, repairing, and maintaining roads and their surrounding right of way in accordance with VDOT policies. Assesses needs for counseling, coaching, training, and disciplining to assist in a results oriented workforce.¹

¹ Hearing Officer Exhibit 1.

No evidence of prior active disciplinary action against Grievant G was introduced during the hearing.

The Virginia Department of Transportation employs Grievant F as a Transportation Operations Manager I. The purpose of his position is:

Serve as a working supervisor for work crews performing construction and maintenance activities on highways in a residency area headquarters. Assist in the administering of maintenance and VDOT safety program and area headquarters activities related to the maintenance program.²

No evidence of prior active disciplinary action against Grievant F was introduced during the hearing.

The Agency's Local Office where Grievant G and Grievant F work was at risk of being closed. On November 9, 2006, Grievant G instructed Grievant F and another employee to take mobile message boards and place them on highways to be seen by members of the public. The message placed on the board asked the public to help keep the Local Office opened and to comment by calling the listed telephone number. Many people called the telephone number and a voice mailbox of the employee with that telephone number filled. This employee called the Residency Administrator. The Residency Administrator called the Assistant Residency Administrator and instructed him to remove the signs. The message boards were removed.

The Residency Administrator called Grievant G and told Grievant G that it was an inappropriate use of equipment and messages. Grievant G explained that he had put the signs out to let people know about the public meeting scheduled to discuss closing the Local Office. The Residency Administrator told Grievant G that regardless of the reasons, using the signs should not have been done. The Residency Administrator told Grievant G not to allow this to be done again. The Residency Administrator told Grievant G that they would use other means to provide the public with appropriate information.

Grievant G spoke with Grievant F and told him that the signs had to be removed because they contained an employee's telephone number.

Grievant G began his vacation on December 11, 2006. On December 14, 2006 he was instructed to attend a public hearing to discuss closure of the Local Office. At the conclusion of that meeting Agency managers announced that the Local Office would not be closed. Several employees, including Grievant G, gathered together after the meeting to informally discuss the decision. One employee suggested that they use the message boards to thank members of the community. Grievant G heard the comment

² Hearing Officer Exhibit 1.

but did not dissuade anyone from using the message boards. Grievant G suggested it might be appropriate to place an ad in a local newspaper to thank the public.

On December 20, 2006, Grievant F decided it would be appropriate to use message boards to thank the public for helping keep open the Local Office. Grievant F and another employee positioned the message boards on highways with a message thanking the public. No telephone numbers were displayed on the message board.

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).

The Virginia Work Area Protection Manual sets forth the Agency's Standards and Guidelines for Temporary Traffic Control. Section 5.2, Public Service Announcements states:

Messages designed to relay a public service announcement (catchphrases, greetings, jingles, general safety statements, non-VDOT public meetings, etc.) shall not be permitted on CMS.⁴ ***

The message appearing on the message board on December 20, 2006 was contrary to this policy because it was a public service announcement.

“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 G

Grievant G's work performance was unsatisfactory for two reasons. First, Grievant G failed to adequately instruct Grievant F to refrain from using the message boards for public service announcements. Grievant G informed Grievant F that the

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

⁴ CMS refers to Changeable Message Signs.

message boards should not display a telephone number. Grievant G failed to inform Grievant F that the message boards should not be used to communicate with the public in a manner similar to the way the message boards were used on December 11, 2006. Second, on December 14, 2006, Grievant G heard an employee propose using the message boards to thank the public. Grievant G had the opportunity to remind employees not to use the message boards for public service announcements, but he failed to do so. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant G argues he should not receive disciplinary action because he was not involved in the display of the signs on December 20, 2006. He was on vacation. Grievant's argument fails because he is not being disciplined for involvement in setting up the signs. He is being disciplined for failing to fully communicate to his subordinates that public service announcements should not be placed on message boards.

Grievant F

Grievant F's work performance was unsatisfactory because he used message boards on December 20, 2006 to convey a public service announcement contrary to Agency written policy. The Agency has presented sufficient evidence to support the issuance of a Group I 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...."⁵ 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 G and Grievant F argue that the disciplinary actions against them should be reduced because of their length of service and otherwise satisfactory work performance. Length of service and satisfactory work performance, standing alone, are not mitigating circumstances under the *Rules*.

⁵ *Va. Code § 2.2-3005.*

Grievant F argues that the disciplinary action against him should be mitigated because he was not familiar with the Agency's policy. It is not necessary for an agency to show that an employee read and understood a policy in order to discipline that employee for failing to comply with a policy. The Virginia Work Area Protection Manual was available to Grievant F online as part of the Agency's intranet. As a supervisor, Grievant F was obligated to remain knowledgeable regarding Agency policies applicable to his position.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary actions.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant G of a Group I Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant F of a Group I 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.⁶

[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

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