

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 07/16/07;  
Decision Issued: 07/26/07; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 8622; Outcome: 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: 8622**

Hearing Date: July 16, 2007  
Decision Issued: July 26, 2007

**PROCEDURAL HISTORY**

On February 16, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instructions and perform assigned work in a satisfactory manner. On March 5, 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 June 7, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 16, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUES**

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:

Virginia Commonwealth University employs Grievant as a Police Corporal/Property Manager. The purpose of this position is:

The Virginia Campus Police Act of 1976 authorizes the establishment of campus police departments at the public institutions of higher learning. Officers assigned to such departments exercise the powers and duties conferred by law upon police officers of cities, towns, and counties. Officers patrol on foot and in automobiles in and around the University to determine security of facility and detect intruders. Officers respond to complaints and requests from the University community. Officers generate reports, arrest or administratively handle complaints. Officers generate field contacts, self initiated activities and respond to radio dispatched calls. Perform comprehensive management of the Property Division of the VCU Police Department. Specifically serves as property manager and handles the long-term and daily assignments necessary for serving the agency.<sup>1</sup>

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<sup>1</sup> Agency Exhibit 4.

Grievant has been employed by the Agency for approximately 20 years. His work performance was otherwise satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency received a grant from the Department of Homeland Security enabling the Agency to purchase Logistical Support Equipment. This equipment needed to be stored in a trailer. The grant provided reimbursement to the Agency for the purchase of an LSE trailer.

The Captain wanted the trailer to be placed in an appropriate location on the Agency's grounds. That location would include a source for electricity to power the trailer. The Captain assigned Grievant the responsibility to coordinate placement of the trailer.

On September 15, 2006, the Captain sent Grievant an email stating, "please contact parking regarding a location for the LSE trailer."

On September 18, 2006, the Captain sent Grievant an email stating:

Please advise on Parking & Trans. Dept. response to our need for a parking place (with power) for the LSE trailer, prior to its delivery. If they have no recommendations or space, get with me & we will move the request up the chain of command.

On January 18, 2007, the Captain sent Grievant an email stating,

Per [Mr. R], please consult with [Ms. K] to identify an appropriate parking location on the [parking deck]. Be sure to confirm the height & length of the trailer (as well as our escort vans). They have gated storage, but you need to assess the feasibility of moving the trailer in & out. Also, determine the spec.'s for electricity for the trailer & have FMD provide a cost estimate as soon as possible.

During staff meetings in January and February 2007, the Captain asked Grievant regarding the status of Grievant's assigned responsibilities with respect to the trailer. Grievant stated that all he had to do was call the Parking Department.

On February 12, 2007, the trailer was delivered to the Agency. The vendor had not called Grievant 24 hours prior to the delivery as Grievant had asked and expected. The trailer was placed in the parking deck that Grievant and Ms. K had selected. The trailer narrowly fit inside the deck and had to be placed in a location without a source of electric power. The Agency spent \$1,946.99 to provide electricity to the trailer. Had Grievant arranged for the electrical installations sooner, the cost could have been included as part of the grant from the Department of Homeland Security. Instead, this cost was paid from Agency funds.

## 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>2</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>3</sup> Grievant was instructed by the Captain, a supervisor, to speak with Ms. K to select an appropriate location for the trailer and ensure that the location had a source of electricity. Grievant spoke with Ms. K and identified an appropriate location for the trailer. He did not ensure that the location within the parking deck would provide a source of electricity to the trailer. Grievant failed to comply with a supervisor’s instruction thereby justifying the issuance of a Group II Written Notice.

*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>4</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 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 of his length of service and otherwise satisfactory work performance. Under the *Rules for Conducting Grievance Hearings*, these factors, standing alone, are not mitigating circumstances. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

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<sup>2</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>3</sup> DHRM § 1.60(V)(B)(2)(a).

<sup>4</sup> *Va. Code § 2.2-3005.*

## 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 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>5</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>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.