

Issue: Group I Written Notice (disruptive behavior); Hearing Date: 08/03/07;
Decision Issued: 08/20/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8642; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8642

Hearing Date: August 3, 2007
Decision Issued: August 20, 2007

PROCEDURAL HISTORY

On December 22, 2006, Grievant was issued a Group I Written Notice of disciplinary action for engaging in an unsolicited conversation with another patroller and being argumentative and disrespectful. On December 27, 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 she requested a hearing. On July 11, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 3, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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:

The Department of Transportation employs Grievant as a Bridge Tunnel Patroller. Grievant liked a co-worker, Mr. J. She considered Mr. J a friend. Mr. J was usually friendly towards Grievant. Grievant did not like co-workers Mr. S and Ms. F. Grievant believed that Mr. S and Ms. F often behaved in a cold and indifferent manner towards her.

On November 14, 2006, Grievant arrived at her workplace ready to begin her shift. She was scheduled to work beginning at 10 p.m. Her shift would end at 6 a.m. on the following morning. When Grievant arrived at work, she encountered Mr. J who was the acting Bridge Tunnel Supervisor for the shift that was ending at 10 p.m. Grievant observed Mr. J speaking to Ms. F in a friendly manner. Mr. J and Ms. F had been engaged in a conversation. Grievant began talking to Mr. J. Since Mr. J was in a conversation with Ms. F, he wanted to finish his discussion with Ms. F. He turned to Grievant and asked, "Are you talking to me?" Grievant continued to talk to Mr. J even though Mr. J was involved in a conversation with Ms. F. Mr. J heard Grievant speaking and turned to her and asked, [Grievant] are you talking to me? I don't know what you are talking about? Have you been drinking?" Mr. J continued his conversation with Ms. F.

As Mr. J finished his conversation with Ms. F, he turned and observed Mr. S.¹ Mr. J began speaking with Mr. S. Grievant observed Mr. J speaking with Mr. S and said words to the effect of, “that is what spiders do, they turn their backs on you.” Mr. S heard Grievant say something about someone not looking her in the eye and about people being liars. He also heard Grievant say “what goes around, comes around” and that what people reap is what they sow. Mr. J was upset by Grievant’s unusual conversation with him and her comment about him being a spider. He did not hear some of the comments Mr. S overheard Grievant making. Mr. J was not used to someone speaking to him in that manner and he believed Grievant was not making sense regarding the remainder of the words she spoke to him. Mr. J said, “I am getting ready to go home. I am going to start my car.” Mr. J then left the office and went to the parking lot.

While Grievant was speaking to Mr. J, she did not raise her voice or use curse words. She spoke, however, with an “attitude.” Grievant’s attitude resulted from her perception that Mr. J was showing favoritism and had sided with two people she disliked and who disliked her, namely Mr. S and Ms. F. Mr. S perceived Grievant as being argumentative.

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).² 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).

“Disruptive behavior” is a Group I offense. Grievant was disruptive for several reasons. First, she interrupted the conversation Mr. J was having with Ms. F. Second, she continued to speak to Mr. J while he was speaking with Ms. F and after it should have been obvious to Grievant that Mr. J did not intend to have a conversation with her at that moment. Third, she referred to Mr. J as a spider who turns on people. Fourth, Grievant made a confrontational statement, namely, “what goes around comes around” and a statement about people reaping what they sow. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group I Written Notice.

¹ Mr. S began working at 10 p.m. He was serving as the Acting Bridge Tunnel Patrol Supervisor for Grievant’s shift.

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

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....”³ 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 the Agency failed to timely investigate and issue disciplinary action. The offense occurred on November 14, 2006 and disciplinary action was taken on December 22, 2006. This period of time is not a sufficient delay to establish mitigating circumstances. There is no reason to believe the memories of witnesses would be affected by that length of delay or that the delay otherwise affected the evidence presented at the hearing.

Grievant contends the disciplinary action should be mitigated because she was having a bad day and she believes that other Agency employees tolerated poor behavior by Ms. F and, thus, they should tolerate her poor behavior. Grievant argued that the Agency inconsistently applied disciplinary action.

Grievant’s assertion that she was having a bad day helps explain her behavior, but it does not form a basis to mitigate the disciplinary action against her. Although Grievant contends her behavior was within the standard tolerated by others in her office, insufficient evidence was presented to establish that standard. No credible evidence was presented to establish Grievant’s assertion that the Agency has inconsistently disciplined employees. 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**.

APPEAL RIGHTS

³ Va. Code § 2.2-3005.

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.⁴

[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].

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer