

Issues: Group I Written Notice (unsatisfactory work performance and disruptive behavior) and Retaliation; Hearing Date: 08/07/07; Decision Issued: 08/21/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8644; 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: 8644

Hearing Date: August 7, 2007
Decision Issued: August 21, 2007

PROCEDURAL HISTORY

On March 13, 2007, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance, disruptive behavior, and use of obscene language. On March 28, 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 July 12, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 7, 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 Virginia Department of Transportation employs Grievant as a Transportation Operator at one of its facilities.

On March 6, 2007, Grievant was working with the Team Leader at a job site. Their objective was to assist and monitor a contractor's pouring of concrete and repairs and installation of a pipe. Mr. G was one of the owners of the private contractor¹. The Employee worked for the contracting business.

In order to complete one of the construction tasks, a bolt was needed to fasten two pipes together. The Team Leader asked Grievant to obtain some bolts from a nearby building. Grievant obtained the bolts and brought them to the Team Leader. The bolts did not fit. Grievant said they should put the bolts in Mr. G's truck. The Team Leader asked what did Grievant say and Grievant responded, "Give them to me, I'll put them in the truck. F--k the State. They can't touch me!"² Mr. G said not to put the bolts in his truck. Grievant put the bolts in Mr. G's truck anyway.

¹ The contractor was in the concrete and landscaping business.

² Grievant was suggesting that it was ok for the contractor to have the bolts because they could be used as part of snow removal and the contractor was authorized for snow removal during the winter. Mr. G testified that although his company was authorized to assist with snow removal, his vehicle had not been used in snow removal and would not likely be used in snow removal.

While they were working at the job site, Grievant was listening to music with his iPod.³ He used a cord with two earphones to hear music from the iPod. Grievant placed one of the earphones in his ear and let the Employee place the other earphone in the Employee's ear to listen to a song. The song was "Smack That" by Snoop Dog. Grievant began singing words aloud and used the phrase, "I want to f—k you." Mr. G and other employees heard Grievant's singing.⁴

The Team Leader asked Grievant to take the front loader and get some dirt to assist with the crew's work. Grievant heard the Team Leader's request but did not obtain the dirt. He preferred to listen to his iPod. The Team Leader asked Grievant two more times to get the dirt. After approximately 30 minutes passed, Grievant used the front loader to obtain the dirt.

While operating the front loader, Grievant was listening to music. He was not wearing his safety belt. He was crouched forward, twirling one hand in the air and thrusting his pelvis towards the steering wheel of the front loader.⁵ His behavior was distracting to the other crew members.

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).⁶ 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, unsatisfactory job performance, and use of obscene language are Group I offenses. Grievant used obscene language by singing lyrics containing the phrase "I want to f—k you" and by saying, "F—k the State." His work performance was inadequate because he did not obtain a load of dirt on a timely basis.

³ Grievant testified that he carried his iPod with him at all times.

⁴ Mr. G was concerned that if his employees observed a State employee behaving as Grievant did, they would assume they could engage in similar behavior. Mr. G would not tolerate behavior like Grievant's from his employees.

⁵ Mr. G described Grievant as "humping the steering wheel".

⁶ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

His behavior was disruptive because he distracted other employees from performing their jobs. Grievant's behavior was upsetting to Mr. G.

Grievant denies the Agency's assertions regarding his behavior.⁷ The Agency, however, has presented sufficient credible evidence to support its issuance of a Group I offense. Mr. G and the Team Leader both testified and their testimony was credible.

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..."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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁹ (2) suffered a materially adverse action¹⁰; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory

⁷ Grievant admitted to using the "F" word but explained that such usage was common place on the job site. The Agency's witnesses countered that cursing may occur on the job site, but use of the "F" word was not frequent.

⁸ *Va. Code § 2.2-3005.*

⁹ See *Va. Code § 2.2-3004(A)(v)* and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

¹⁰ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

business reason for the adverse action, retaliation is not established unless the Grievant's evidence raises a sufficient question as to whether the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.¹¹

Grievant contends he received the disciplinary action as a form of retaliation because he questioned whether the contractor actually had worked eight hours even though the contractor had been paid for eight hours. Grievant has engaged in a protected activity by questioning whether the contractor was over-billing the State. He suffered a materially adverse action because he was disciplined. Grievant, however, has not established a connection between the protected activity and the disciplinary action. Grievant was disciplined because of his inappropriate behavior. No credible evidence was presented to establish that he was disciplined because of his complaint.

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

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

¹¹ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.¹²

[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

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.