

Issue: Group II Written Notice (failure to follow policy and/or procedures); Hearing Date: 09/14/07; Decision Issued: 09/17/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8672; 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: 8672

Hearing Date: September 14, 2007
Decision Issued: September 17, 2007

PROCEDURAL HISTORY

On April 26, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow cash handling security procedures or otherwise comply with established written policy. On May 25, 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 she requested a hearing. On August 16, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 14, 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 Coin Counting Supervisor at one of its facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On February 15, 2007 at approximately 9 p.m., Grievant dispensed a Red Bag containing \$400 to the Toll Collector prior to the Toll Collector beginning his duties at the toll booth. The Toll Collector was supposed to leave the tollbooth at midnight and return the Red Bag to Grievant. Grievant was supposed to record her receipt of the Red Bag and confirm that all the money she had dispensed to toll collectors in Red Bags prior to their shifts matched the monies she received at the conclusion of their shifts.

The Toll Collector experienced problems with his vehicle and did not return to Grievant's location at the conclusion of his shift.¹ The Toll Collector kept his Red Bag. When Grievant finished her shift in the early morning of February 16, 2007, she completed the necessary financial paperwork but showed that she had received the \$400 from the Red Bag. Grievant did not report the shortage to her Supervisor. Later

¹ The Toll Collector's vehicle stopped working at 12:05 a.m. He did not have a cell phone to call Agency supervisors.

in the morning after Grievant had finished her duties and left worksite, the Toll Collector returned his Red Bag to another unit of Agency.

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).

Standard Operating Procedure 3.11, Overage/Shortage Report Procedures provides, in part:

All overage/shortage forms shall be submitted to the Fiscal department at the completion of each shift. The forms shall be deposited into the Fiscal mailbox.

Security Procedures for the Coin Counting Area provide, in part:

13. The outgoing Supervisor shall verify the Operating fund and turn it over to the successor. The oncoming Supervisor shall sign and verify for the total Operating fund. ***

15. Any variances experienced with Operating funds shall be recorded on the appropriate forms in a timely manner.³

When the Toll Collector failed to return his bag to Grievant, a variation arose between the total amount of money Grievant dispensed to toll collectors and the total amount of money returned to Grievant. When Grievant finish her shift and left the worksite, her funds were \$400 short because the Toll Collector had not returned his Red Bag. Grievant failed to note this variance on the appropriate forms. She did not notify her Supervisor of the shortage.

“Failure to ... otherwise comply with established written policy” is a Group II offense.⁴ Grievant failed to comply with written policy because she failed to note a

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

³ Agency Exhibit 7.

⁴ DHRM Policy 1.60.

\$400 variance in her cash funds. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice the failed to follow established written policy.

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 contends the disciplinary action should be mitigated because the penalty is too harsh. She believes her mistake could have been resolved with a counseling memorandum or a Group I Written notice. Once an agency meets its *prima facie* case, the *Rules* require the Hearing Officer to give deference to the agency’s level of disciplinary action unless the level of disciplinary action is beyond the bounds of reasonableness. The level of discipline in this case is not beyond the bounds of reasonableness because it is consistent with the DHRM Standards of Conduct. 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 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.

⁵ *Va. Code § 2.2-3005.*

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.