

Issues: Group II Written Notice with termination (due to accumulation) (Failure to Follow Policy); Hearing Date: 10/18/07; Decision Issued: 10/19/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8704; Outcome: Partial Relief (Written Notice reduced to Group I, Termination upheld due to accumulation).



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8704

Hearing Date: October 18, 2007
Decision Issued: October 19, 2007

PROCEDURAL HISTORY

On June 26, 2007, Grievant was issued a Group II Written Notice of disciplinary action with removal based on the accumulation of disciplinary action for failing to remain alert and attentive while performing security duties. On July 24, 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 September 10, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 18, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
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 employed Grievant as a Bridge Tunnel Patroller at one of its Facilities. She worked for the Agency from March 23, 1992 until her removal effective June 26, 2007. The purpose of her position was:

Performs a variety of tasks associated with safety directing and controlling high-speed traffic on bridges and tunnels. Enforce rules and regulations by inspecting vehicles containing hazardous materials, cargo manifests, oversized vehicles/cargo, and state travel permits. Maintains security at the Bridge Tunnel facility, including connecting roads and approaches. Assist motorists. Performs additional duties in related job classifications when necessary. This position is designated as essential and, as such, all duties associated with this position are required during emergency situations which may include but are not limited to inclement weather, disaster response and emergency operations. VDOT will determine when essential positions are required.¹

¹ Agency Exhibit 2.

Grievant has prior active disciplinary action. On February 16, 2007, Grievant received a Group III Written Notice with suspension for sleeping during working hours.²

On May 25, 2007, Grievant was working in a guard shack located near one of the Agency's tunnels. The shack consisted of a small room with a chair for an employee to sit while observing traffic. Each of the four walls contained windows enabling the employee inside the shack to see all around the location. The Agency expected employees working inside the shack to keep the light on so that a motorist seeking assistance could see the employee at night and speak with the employee. The Agency permitted employees to listen to music while they worked.

At approximately 4:50 a.m. on May 25, 2007, Grievant's Supervisor drove his vehicle towards the guard shack where Grievant was working. He noticed that the light inside the guard shack was turned off. He considered this to be unusual, so he decided to investigate further. He parked his vehicle in front of the booth and stayed there for a few minutes. He observed no movement from Grievant inside the booth. He got out of his vehicle and opened the door to the guard shack. He observed the back of Grievant. Grievant remain seated in a chair with her head leaning to the side. The Supervisor observed Grievant for a few seconds but she did not acknowledge his presence. He walked to her chair and shook it. Grievant immediately responded, "stop, stop shaking the chair, I have been awake all night and now you have caught me asleep. I am sick of this sh-t." The Supervisor told Grievant she failed to follow security procedures. He told her she should turn the lights on. He then departed.

The Agency sought written statements from the Supervisor and Grievant. On May 26, 2007, Grievant wrote:

[Supervisor] came on station stating I was [asleep.] Yes my eyes may have been closed but I was listening to music and quite [naturally] I didn't see him. I wasn't asleep. I was meditating on the music. I was and have been awake all [night] long. I was not in a sleeping position.³

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."⁴ 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."

² Agency Exhibit 3.

³ Agency Exhibit 2.

⁴ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.”

The Agency contends Grievant should receive a Group II Written Notice for “[f]ailure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy”. This argument fails. The Agency has not identified a specific supervisor who gave a specific instruction to Grievant on a certain date. The Agency has not identified any work that was assigned to Grievant which she failed to perform. The Agency has not identified any written policy with which Grievant failed to comply. The Agency has not presented sufficient evidence to support the issuance of a Group II Written Notice.

“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’s Employee Work Profile lists one of her Core Responsibilities as, “Monitor and Inspect Vehicles”. As a measure of this Core Responsibility, Grievant is expected to, “[r]emain alert, visible and attentive to traffic.”⁵ On May 25, 2007, Grievant was not alert and attentive to traffic. She turned off the lights in the guard shack. She was listening to music. She was meditating on the music and she had her eyes closed. She did not notice the Supervisor approach the guard shack. Grievant was not alert and attentive to traffic. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Disciplinary action is cumulative. An employee with an active Group III Written Notice who receives additional disciplinary action may be removed from employment. Accordingly, the Agency’s decision to remove Grievant from employment must be upheld.

Grievant argues that she was not asleep on May 25, 2007. The Agency did not issue disciplinary action to her for sleeping on the job. If the Hearing Officer assumes for the sake of argument that Grievant was not asleep, the outcome of this case is not affected. It is not necessary for the Agency to establish that Grievant was asleep in order to support the issuance of a Group I Written Notice for being inattentive.

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....”⁶ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any

⁵ Agency Exhibit 2.

⁶ *Va. Code § 2.2-3005.*

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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice. Grievant's removal from employment is **upheld** based upon the accumulation of disciplinary action.

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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.