

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 12/06/07;
Decision Issued: 12/27/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8733; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8733

Hearing Date: December 6, 2007
Decision Issued: December 27, 2007

PROCEDURAL HISTORY

On July 11, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to perform assigned work and to follow established policy. On August 9, 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 October 31, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 6, 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 employs Grievant as a Human Resources Analyst II at one of its Facilities. She began working at the Facility in 2000. The purpose of her position is:

As a member of the HR Management Team, this position provides expert knowledge in all human resources functions. Incumbent is responsible for planning, prioritizing, organizing, supervising and forecasting the activities and managing Generalist Team Members. Provides information and/or appropriate interpretation, of Agency, State and/or departmental HR policies, practices and procedures. These positions and procedures govern all areas of Human Resources to include, but not limited to the areas of compensation, recruitment/selection, employee relations, MEL/ERL management, staffing, and special agency/district initiatives many of which may have a major impact on the agency's Organizational Development and Human Resources programs and implementation. This position incumbent provides guidance, direction, leadership, expert expertise with independent decision-making authority for the district's compensation, classification, selection/recruitment, employee relations decisions and participates in and/or facilitates problem solving activities with supervisors/managers/employees in any/all associated activities. This position incumbent works with diverse audiences and customers from every level within the Agency and organization to include but not limited to the Attorney General's office, legal counsel, department management,

school officials and the general public and other state and private sector agencies.¹

In January 2007, the Agency sought applicants for the position of Bridge Tunnel Superintendent Operations at one of its Facilities. Grievant was responsible for screening all applicants and determining which applicants should receive interviews by Agency managers. Grievance spoke with one of the managers supervising the open position and concluded that one of the screening tests would be whether the applicant had supervised more than 100 people. Nothing in the employee work profile or advertisement for the Bridge Tunnel Superintendent Operations required experience in supervising more than 100 people.

Mr. C had been serving as the Acting Bridge Tunnel Superintendent Operations from April 2006 through January 2007. He applied for the permanent position. Grievant reviewed all of the applications for employment and concluded that Mr. C should not be interviewed for the position, in part, because he had not supervised more than 100 people.

Mr. C complained to Human Resource District Manager that he had not been selected for an interview.² He believed he should have been selected because he had been performing the job for over nine months.³ On March 30, 2007, the Human Resource District Manager concluded it was necessary to extend the interview period to include those who have been arbitrarily excluded such as Mr. C.

In April 2007, the Agency sought applicants for the position of Operations Crew Member. This position required the employee to have a Commercial Drivers License. Grievant reviewed the applicants for the position and selected for interviews two employees who did not have Commercial Drivers Licenses. When other employees learned that the two applicants had been selected for interviews, they questioned why the two employees had been granted interviews without being qualified for the open position. When questioned, Grievant admitted she made a mistake by selecting for interview two employees who were not qualified for the position.

The Agency selected an individual for the position of Policy & Planning Manager I. On May 2, 2007, the Hiring Manager notified the Human Resource District Manager of the Successful Candidate. On May 3, 2007, the Successful Candidate signed a DMV Information Request form as part of the necessary paperwork for the hiring process. A number of days later, the Hiring Manager called the Human Resource District Manager to complain that the Successful Candidate had not yet been hired. The Human

¹ Agency Exhibit 18.

² Mr. C also filed a grievance challenging his exclusion from the interview process.

³ Another employee, Ms. C, concluded that the application process for the position was unfair and designed to choose a pre-selected candidate. She withdrew her application.

Resource District Manager contacted Grievant and asked her to explain the delay.⁴ Grievant said that the Successful Candidate had not completed the DMV Information Request form. Grievant did not realize that the form actually had been completed and the application package was ready for processing. According to the Human Resource District Manager, Grievant's inaction resulted in an approximately 10 day delay in the hiring process.

Mr. E previously worked for the Agency. He left the Agency after having displayed a pattern of absences. He applied for a position with the Agency and was chosen for that position by a hiring panel. When a manager, Mr. C, learned that Mr. E was about to be rehired, he approached Grievant to determine how the rehiring could be avoided.⁵ Grievant told him that there was no legal way to avoid hiring Mr. E. Mr. E was hired by the Agency, but during the probation period was removed from employment.

Grievant had direct knowledge of the circumstances under which Mr. E left the Agency. She was aware that he had filed a grievance regarding his transition from short-term disability to long-term disability. Grievant verified that the employee was eligible for rehire.

The Agency scheduled a job fair for July 10, 2007 in order to recruit for approximately 15 vacant positions. Grievant was responsible for planning the job fair. As part of her plan, advertisements for the job fair would appear in the local newspaper on the two Sundays prior to July 10, 2007. Grievant delegated to a subordinate the task of contacting the local newspaper and arranging for the two dates of advertisement. The job fair advertisement, however, appeared on only one Sunday prior to the event instead of appearing on two Sundays.

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."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."

⁴ The Agency presented evidence of another position, Transportation Operations Manager II, for which Grievant was slow to process the necessary paperwork. Grievant's inaction in that example also rises to the level of a Group I offense.

⁵ In a statement dated July 5, 2007, Mr. C wrote, "While [Mr. E] was an employee at the [Facility], he had displayed a pattern of going out on short-term disability and returning to work only long enough to be eligible to go out on short-term disability again. During one of these cycles [Mr. E] switched over to long-term disability and was removed from the payroll at [the Facility]." See, Agency Exhibit 13.

⁶ 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.”

Grievant's position required her to exercise judgment in selecting which candidates the Agency should interview. There is nothing about the Bridge Tunnel Superintendent Operations position to indicate that someone supervising fewer than 100 employees would necessarily lack the experience to perform the duties of the position. Grievant arbitrarily selected 100 as the number of employees an applicant needed to have supervised in the past in order to receive an interview for the open position. The Agency has presented sufficient evidence to show that Grievant's behavior rises to a level warranting disciplinary action.

The Agency contends Grievant's behavior rises to the level of a Group II Written Notice for failure to follow established written policy. In particular, the Agency contends Grievant violated DHRM policy 2.10 which defines "Screening" as:

The process of evaluating the qualifications of individuals in an applicant pool against established position qualifications to determine:

- which applicants in the pool meet minimum qualifications; and
- which of the qualified applicants an agency wishes to interview.

The Agency's argument fails for two reasons. First, this provision of the policy sets forth a definition. It does not contain a specific instruction directed at an employee's behavior.⁷ Second, to the extent this section creates a directive, Grievant attempted to comply with that directive. She evaluated applicants to determine which applicants should be interviewed. The concern about Grievant's behavior is not that she failed to comply with the policy, but rather that she failed to do so adequately. In other words, her work performance was unsatisfactory to the Agency. Inadequate or unsatisfactory job performance is a Group I offense.

Grievant admits she made a mistake by selecting two employees who did not have Commercial Drivers Licenses to interview for the Operations Crew Member position. The Agency contends Grievant failed to comply with the definition of "Screening" under DHRM policy 2.10. The Agency's argument fails based on the above-mentioned reasoning. Grievant complied with DHRM Policy 2.10 because she selected only those candidates she believed were qualified for interviews. Her judgment, however, was mistaken. She included two individuals who are not qualified for the position. Her work performance was unsatisfactory to the Agency. Inadequate or unsatisfactory job performance is a Group I offense, not a Group II offense.

⁷ In essence, the policy specifies that Grievant should exercise her judgment to screen applicants. Grievant exercised her judgment thereby complying with the policy.

Grievant failed to timely process the hiring package for the Policy & Planning Manager I position. The Agency has not identified a policy setting forth specific time requirements for the processing of hiring packages. Accordingly, Grievant's behavior does not rise to the level of a Group II offense for failure to follow established written policy. Grievant's work duties required her to process hiring packages on a timely basis. The 10 day delay was unnecessary and amounted to unsatisfactory work performance, a Group I offense.

The Agency contends that Grievant abandoned her responsibilities to properly conduct a background check with respect to the rehiring of Mr. E. The Agency argues Grievant knew that Mr. E had problems with attendance and that she should have taken action to prevent his rehiring. This argument fails. Although Grievant knew Mr. E had a history of poor attendance, she also knew he was absent while on short-term disability. She also knew that he had filed a grievance challenging the Agency's treatment of him with respect to his disability status. DHRM Policy 2.05 prohibits discrimination "against otherwise qualified persons with disability." If Grievant had taken action to stop the rehiring of Mr. E, she would have placed the Agency at risk of discriminating against Mr. E because of his disability. Instead, Grievant appropriately exercised her judgment to allow the hiring process to proceed.

Grievant was responsible for managing the job fair. She delegated to a subordinate the task of contacting the local newspaper and scheduling ads for two Sundays prior to the event. The subordinate failed to comply with Grievant's instructions. The Agency contends Grievant should be disciplined because the ad appeared on only one Sunday prior to the job fair. The Agency's argument fails. The Agency admits that Grievant was authorized to delegate the task to her subordinate. The subordinate made a mistake, not Grievant. A supervisor is not responsible for the poor work performance of a subordinate unless an agency has placed at supervisor on notice of its expectation. Grievant is not responsible for the error of the subordinate. There is no basis to take disciplinary action against Grievant with respect to the job fair.

The Agency has established that Grievant engaged in behavior giving rise to disciplinary action. It has not met its burden of proof to show that the level of disciplinary action should be elevated from a Group I Written Notice to a Group II Written Notice. The Agency has not been able to identify the specific terms of a written policy violated by Grievant. In addition, the Agency alleged Grievant failed to comply with a supervisor's instructions.⁸ For example, the Human Resources District Manager instructed Grievant to utilize a planning tool to enable her to timely process her work. The evidence showed, however, that Grievant utilized the planning tool but did so ineffectively. Grievant did not disregard the Supervisor's instruction, Grievant simply

⁸ Grievant received a counseling memorandum dated February 26, 2007 addressing her failure to timely screen applicants. The memorandum does not contain an instruction with sufficient detail to support the Agency's contention that Grievant should receive a Group II Written Notice. An instruction that an employee should perform his or her job better is not an instruction sufficient to raise future inadequate job performance from a Group I offense to a Group II offense.

failed to perform at the level expected by the Human Resources District Manager. Thus, Grievant's behavior was unsatisfactory work performance.

The Agency has presented evidence of a several incidents giving rise to disciplinary action. Although it could have issued separate Written Notices, the Agency issued one Written Notice. An agency may not take separate events that would otherwise constitute Group I offenses and combine them into one Written Notice with a higher level of discipline such as a Group II Written Notice. This practice is not authorized under DHRM Policy 1.60. In addition, it would have the effect of extending the life of a Written Notice from two years for a Group I Written Notice to three years for 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....”⁹ 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's reorganization in April 2007 caused her to have more work than she could handle. This argument fails. The Agency's reorganization changed Grievant's job from one with a few duties in many areas to one with many duties in a few areas of expertise. At one point, the Human Resource District Manager asked Grievant if she needed assistance. Grievant declined the offer of assistance. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce further 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.

⁹ *Va. Code § 2.2-3005.*

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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

appeal rights from an EDR Consultant].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer