

Issue: Group II Written Notice with suspension (failure to follow policy); Hearing Date: 11/08/07; Decision Issued: 11/21/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8735; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8735

Hearing Date: November 8, 2007
Decision Issued: November 21, 2007

PROCEDURAL HISTORY

On July 13, 2007, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for receiving gifts from a vendor and purchasing items from the vendor at excessive costs without first utilizing mandatory purchasing sources.

On July 23, 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 October 17, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 8, 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 Facility Manager. In 2001, Grievant worked as a Bridge Superintendent of Maintenance. He reported to the Supervisor. Grievant has been employed by the Agency for approximately 29 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

In January 2005, VDOT's Office of the Inspector General received information from another state that the Vendor paid bribes in the form of gifts to employees for purchasing supplies at inflated prices. The Vendor was prosecuted and convicted pursuant to plea agreement. As part of the plea agreement, the Vendor made its records available to law enforcement. VDOT obtained copies of the Vendor's sales records relating to VDOT employees. VDOT delayed its administrative investigation in order to enable the State Police and law enforcement agencies to investigate and determine whether criminal charges should be brought against VDOT employees. In August 2006, a majority of the Commonwealth's Attorneys had declined to prosecute the VDOT employees in their jurisdictions. All of the Commonwealth's Attorneys had

declined to prosecute VDOT employees by January 2007. The Agency began its administrative investigation.

Agency Investigators met with staff of the Office of the Attorney General to determine how to proceed. Staff of the Office of the Attorney General advised the Agency to focus on employees who received gifts of more than nominal value in total. They concluded that gifts totaling more than \$50 were of more than nominal value. Agency Investigators focused on 13 employees who received gifts of more than \$50. Grievant was one of those employees.

According to the Vendor's records, Grievant ordered for the Agency windshield de-icer concentrate on January 26, 2001 at a cost of \$549.64. Based on this purchase, Grievant was qualified to receive a bait cast combo and hat gift with the value of \$49.99. On February 22, 2001, Grievant ordered a rust preventative at the cost of \$1,918.28. Based on this purchase, Grievant qualified to receive a fishing rod and reel with a value of \$69.94. On March 19, 2001, Grievant ordered graffiti remover at the cost of \$1,558.50. This qualified him to receive a gift card with a value of \$50. Grievant qualified to receive gifts totaling \$169.93. The Vendor's invoices show that the products were to be shipped to be Agency but the gifts were to be shipped to Grievant's home address.

In 2001, the Program Support Tech Senior (PSTS) handled all of the purchasing at Grievant's Facility.¹ When an employee asked her to purchase something, she followed a series of steps to obtain the right product. First, she would determine if the product was available in the State inventory. Second, if the item was not in the State inventory, she would document this fact and then attempt to obtain the product from several vendors. After obtaining several quotes, she would select a product with the lowest cost and best value. Third, she would speak with Grievant and obtain approval to purchase the product.

Grievant circumvented the Agency's customary practice for purchasing items from vendors. Grievant spoke with the Vendor directly. Grievant did not ask the PSTS to attempt to obtain the items from the State inventory. Grievant did not obtain quotes from several vendors and select the product based on cost and value. When the PSTS found out about Grievant's direct purchases from the Vendor in 2001, she reported her concerns to the District Inventory Manager. The PSTS thought that the prices Grievant authorized to pay to the Vendor were very high. As part of the Agency's investigation, the Agency concluded that the \$3,857.34 worth of supplies Grievant purchased from the Vendor could have been purchased for \$527.66 from other vendors.

Grievant denied providing the Vendor with his home address. Grievant's home address is not information that Agency employees would normally provide to a Vendor. It is not known how the Vendor obtained Grievant's home address.

¹ The PSTS reported to Grievant.

Grievant admitted to receiving the rod and reel but did not recall receiving the other two gifts. Other than the Vendor's invoices, there is no evidence to show that the other two gifts were sent to Grievant and delivered to his residence. The Vendor's invoices, standing alone, are insufficient to show that Grievant received the other two gifts. No evidence was presented showing the other two items were actually mailed by the Vendor to Grievant.

On the day the fishing rod and reel arrived at his house, Grievant's wife called him at work and told him there was a long tubular package at the door and inside was a fishing rod. The next day Grievant brought the fishing rod and reel into the office. He told the Supervisor about the rod and reel coming to his house. Grievant asked the Supervisor what Grievant should do. The Supervisor advised Grievant that the item had to be returned to the Vendor and that the Agency could not keep the item. The Supervisor instructed Grievant to send the item back to the Vendor. Grievant attempted to return the fishing rod and reel to the Vendor but was having difficulty doing so.² Grievant told the Supervisor he was having difficulty returning the rod and reel. The Supervisor told Grievant he would decide what to do with the rod and reel and then inform Grievant of his decision. The Supervisor considered whether to give away the rod and reel as part of a raffle held during employee appreciation day. The Supervisor approached the Human Resource Manager and told him that the Supervisor planned to give away the rod and reel as part of a raffle. The Human Resource Manager told the Supervisor that the idea sounded reasonable. The Supervisor told Grievant that the Agency would give away the rod and reel to one of its employees. When Agency employees gathered on employee appreciation day, an employee won the raffle and took the rod and reel.

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."³ 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." Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal."

The Agency has presented sufficient evidence to show that Grievant engaged in behavior giving rise to disciplinary action. Grievant circumvented the Agency's

² The Supervisor could not remember why Grievant was having difficulty returning the rod and reel to the Vendor. The Agency did not rebut the Supervisor's testimony. There is no reason to disbelieve that Grievant was having difficulty returning the rod and reel to the Vendor.

³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

customary product purchasing practices. Grievant paid inflated prices for products he could have obtained more cheaply.

The Agency has not established any misconduct by Grievant with respect to the fishing rod and reel. The rod and reel was received by Grievant's wife at his house. Grievant brought the rod and reel into the office and informed the Supervisor that he had received the item. Grievant sought the advice of his Supervisor. The Supervisor instructed Grievant to attempt to return the rod and reel. Grievant attempted to return the item but had difficulty doing so. The Supervisor decided to take the rod and reel and give it away at an employee function. The Supervisor consulted with the Agency Human Resource Manager who agreed. No evidence has been presented to show that Grievant asked to receive the rod and reel at his house and accepted it with the intent of keeping it for himself. Grievant was obligated to comply with the instructions of the Supervisor. When the Supervisor decided that the rod and reel should be given away at the employee function, the Supervisor took dominion and control of the rod and reel and, thus, became responsible for the manner in which the item was disposed.

The Agency argues Grievant acted contrary to Virginia law by accepting the rod and reel. *Va. Code* § 2.2-3103 prohibits a state employee from accepting a thing of value for services performed within the scope of his or her official duties. *Va. Code* § 2.2-4371 prohibits a public employee who has official responsibility for a procurement transaction from accepting from the vendor anything of more than nominal value. *Va. Code* § 2.2-4372 prohibits kickbacks. These sections are intended to prohibit State employees from personally profiting while conducting their official State duties. Grievant did not personally profit from his receipt of a fishing rod and reel. Grievant delivered the rod and reel to the Supervisor who determined what to do with the item.⁴

Although the Agency has presented sufficient evidence to show that Grievant engaged in behavior giving rise to disciplinary action because he circumvented the customary procurement process and overpaid for goods, the question arises regarding what level of discipline is appropriate. The Agency argues Grievant should receive a Group II Written Notice for "[f]ailure to ... comply with established written policy." The Agency has not presented the procurement policies in effect in 2001 stating that Grievant was obligated to obtain competitive bids product purchasing the items from the Vendor. Although the PSTS testified the Agency had policies requiring her to obtain items from the State inventory and if the items were not available, to obtain competitive bids, the Hearing Officer is reluctant to apply an Agency policy to Grievant without having the opportunity to review the policy and verify its applicability to Grievant. Accordingly, the Agency's selection of the level of discipline for Grievant cannot be sustained.

⁴ The Agency contends Grievant "accepted" the fishing rod and reel thereby violating State law. If the Hearing Officer adopts the strict definition of accepted offered by the Agency, Grievant's wife would have been the one who actually accepted the fishing rod and reel from the Vendor. Grievant accepted the item from his wife and not directly from the Vendor. "Accepted" as referred to in the statutes refers to an employee who has accepted something for personal gain.

“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.

The Agency has established that Grievant exercised his judgment to circumvent the customary procurement practice which resulted in the Agency purchasing goods at substantially inflated prices. Grievant's behavior was unsatisfactory work performance thereby justifying the issuance of a Group I 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....”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 of the length of time between the transactions in 2001 and the time he was charged in 2007. This argument fails. The Agency did not learn of the transactions with the Vendor until 2005. It had to wait until law enforcement officials completed their investigations before it could begin its administrative investigation. Once the Agency was able to begin its administrative investigation, it did so. There is no basis to mitigate the disciplinary action below a Group I Written Notice based on Agency delay. 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 with suspension is **reduced** to a Group I Written Notice. Because the normal disciplinary action for a Group I offense is issuance of a Written Notice, Grievant’s suspension is **rescinded**. The Agency is directed to provide the Grievant with **back pay** for the period of suspension less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue.

⁵ *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.⁶

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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