

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 05/21/08;
Decision Issued: 05/22/08; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8842; 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: 8842

Hearing Date: May 21, 2008
Decision Issued: May 22, 2008

PROCEDURAL HISTORY

On December 21, 2007, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction. On January 17, 2008, Grievant timely filed a grievance to challenge the Agency's action. The Third Step Respondent reduced the disciplinary action from a Group II Written Notice to a Group I Written Notice. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On April 24, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 21, 2008, 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 II at one of its Residencies. Grievant reported to the Maintenance Supervisor who reported to the Area Supervisor. The Area Supervisor reported to the Maintenance Operations Manager. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

In August 2006, Managers at Grievant's Residency adopted an unwritten policy to protect maintenance employees from inadvertently entering leave without pay status. Managers wanted the approximately 62 employees working in the Residency to maintain leave balances of at least 40 hours in the event an employee could no longer work due to injury or disability. The Managers believed that an employee had to wait approximately 5 work days before receiving benefits under worker's compensation or short-term disability. If an employee went out of work on workers compensation or short-term disability and the employee did not have 40 hours of leave available, that employee would transition to leave without pay status and stop accruing benefits such as additional leave. To reduce the risk of this problem occurring, the Managers decided that employees with leave balances below 40 hours had to obtain permission to take additional leave from the Maintenance Operations Manager instead of the Area Supervisor. The objective under this unwritten policy was to enable the Maintenance Operations Manager to ask additional questions of the employee prior to approving that employee's leave to ensure that the request was not frivolous. Residency maintenance employees were informed of this policy at morning safety meetings.

Grievant had been out for work for an extended period of time. He resumed working at the Residency two hours per day but was on leave six hours per day so he

could receive medical treatment. Some of Grievant's prior approved leave had been canceled and the Agency's leave balance system showed Grievant's leave balance was approximately 34 hours.

On October 30, 2007, the Fiscal Assistant notified the Area Supervisor that Grievant's leave balances were below 40 hours. At approximately 9 a.m., the Area Supervisor met with Grievant and told Grievant that because his leave balances were below 40 hours, Grievant needed to obtain permission from the Maintenance Operations Manager to take leave instead of obtaining permission from the Area Supervisor. The Area Supervisor asked Grievant if Grievant understood what he said. Grievant acknowledged the Area Supervisor's instruction.

Grievant had a medical appointment scheduled for the afternoon of October 30, 2007. Grievant left the Residency without first contacting the Maintenance Operations Manager to obtain permission to take leave.

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."¹ 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."

"Failure to follow a supervisor's instructions" is a Group II offense. On October 30, 2007, the Area Supervisor instructed Grievant to call the Maintenance Operations Manager to obtain permission to take leave.² Later that day, Grievant disregarded that instruction and left the Residency to obtain medical treatment. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions.³ The Agency reduced the Group II Written Notice to a Group I Written Notice.

Grievant argued that he had medical leave that was necessary for him to take. Grievant's argument is unpersuasive. The Agency required Grievant to speak with the Maintenance Operations Manager to obtain permission to take leave. No one in the

¹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

² The Standards of Conduct states that, "[e]mployees should arrange planned absences, including reporting to work late or leaving work early, in advance with supervisors." DHRM Policy 4.57 states that, "[e]mployees should request [sick leave], when feasible, prior to its use in accordance with agency procedures.

³ The Agency's failure to put in writing its informal policy did not undermine the Area Supervisor's authority to instruct Grievant regarding how to seek approval for leave.

Agency indicated to Grievant that he was prohibited from taking available leave. Before Grievant's leave balances drop below 40 hours, he was obligated to obtain permission from the Area Supervisor to take leave. All the Agency did was to change the supervisor to whom Grievant had to direct his requests for leave. The testimony showed that of the three other employees whose leave balances dropped below 40 hours, none of them had their leave requests denied by the Maintenance Operations Manager.

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..."⁴ 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 that the disciplinary action against them is too harsh and that the Agency should have issued him a written counseling instead of a Written Notice. These arguments fail. When an employee engages in behavior contrary to the Standards of Conduct, the Agency may issue a Written Notice without first having counseled that employee. The *Rules for Conducting Grievance Hearings* do not authorize the Hearing Officer to reduce disciplinary action merely because it is too harsh if the Agency has shown that the disciplinary action does not exceed the limits of reasonableness. In this case, the Agency's disciplinary action does not exceed the limits of reasonableness. 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 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:

⁴ *Va. Code § 2.2-3005.*

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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.