

Issue: Group III Written Notice (acting beyond scope of authority) with Demotion and Pay Reduction; Hearing Date: 09/19/08; Decision Issued: 02/21/09; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 8934; 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: 8934

Hearing Date: September 19, 2008
Decision Issued: February 12, 2009

PROCEDURAL HISTORY

On June 2, 2008, Grievant was issued a Group III Written Notice of disciplinary action with demotion and disciplinary pay reduction for acting beyond the authority of his position.

On June 10, 2008, 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 August 13, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 19, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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 Department of Motor Vehicles employed Grievant as a DMV Division Manager - Hauling Permits until his demotion effective June 3, 2008 to the position of Hauling Permit Technician. The purpose of his position as a DMV Division Manager - Hauling Permits was:

This is a managerial position which is responsible for the administration and day-to-day operations of the hauling permit staff on all aspects of the Hauling Permit Program of Motor Carrier Services; serves as a subject-matter expert.¹

Grievant supervised approximately 12 employees. One of Grievant's Core Responsibilities was Management Liaison. Under this Core Responsibility, Grievant was expected to:

- Brief Deputy Director or Director of situations or problems within the Hauling Permit Program regarding customers, employees, policies, procedures or processes that could hinder customer service, customer relations, employee development when it may be elevated for resolution.

¹ Agency Exhibit 4.

- Develop action plan to resolve problems or conflicts.
- Work closely with the Virginia State Police and the MCSC Program to ensure Hauling Permits are enforceable and permit conflicts are resolved to the satisfaction of all.
- Maintain effective working relationships with all private and public contacts (i.e. inter-agency teams, vendors etc.)²

Grievant has been employed by the Commonwealth for approximately 19 years.³

On January 24, 2008, State Trooper L issued a Virginia Overweight Citation to Defendant D alleging Defendant D's vehicle was operating at a weight exceeding the maximum allowable weight. The matter was scheduled to be heard in a local General District Court on May 21, 2008. Defendant D had obtained a hauling permit from the Agency and believed the vehicle was not overweight.

On January 28, 2008, Grievant wrote a letter on Agency letterhead address to the Clerk of the Court of a local General District Court stating:

I am writing this letter to introduce myself and to request that the Court show lenience in the overweight citation issued to [Defendant D] on January 24, 2008 and scheduled to be heard in court on May 21, 2008. I am [Grievant], Supervisor of the DMV Hauling Permit Section. I have reviewed the citation and the circumstances surrounding the issuance of the permit for which [Defendant D] was cited and the permit that was issued is not a Superload Blanket permit and was issued prior to the time frame in which the permits were required to have the updated exclusion list or the 45T Bridge Listing attached. The Overweight citation was written, as I understand it, because the permit holder did not have an updated 45T Bridge listing, which he did not need because this was not a Superload Blanket Permit.

I ask that the overweight portion of citation [number] be granted some leniency because of a misunderstanding of the regulations. However, if there are other violations in which the citing officer wishes to pursue, please do so. I apologize for any inconvenience this request may cost the court or [State Trooper L].

Should you have any questions, I can be reached at [telephone number] or via e-mail at [e-mail address]. I will be happy to offer any additional information. Thank you for your time and attention on this matter.

² Agency Exhibit 4.

³ The Hauling Permit section was transferred from VDOT to DMV in August 2003.

On January 31, 2008, Grievant met with the Director of Vehicle Services and the Regional Manager to outline a process to deal with issues relating to discrepancies in the issuance of overweight citations. Grievant agreed that if he observed problems or disputes regarding overweight citations he would notify the Regional Manager and let the Regional Manager resolve the problem with the trooper. The meeting on January 31, 2008 was held because a state trooper had contacted the Regional Manager to complain. The state trooper learned from his supervisor that a citation was being dismissed because of concerns about whether the trooper's citation was appropriate. The trooper felt like he was being "beaten up on" for the quality of his work. During the January 31, 2008 meeting, Grievant did not inform the Director of Vehicle Services or Regional Manager that he had written several letters such as the January 28, 2008 letter. At that time, the Director of Vehicle Services did not know Grievant was sending letters to courts.

On February 26, 2008, State Trooper T issued Defendant C a Virginia Overweight Citation alleging Defendant C's vehicle was operating at a weight exceeding the maximum allowable weight. The matter was scheduled to be heard in a local General District Court on May 12, 2008. Defendant C had obtained a hauling permit from the Agency and believed the vehicle was not overweight.

On March 4, 2008, Grievant wrote a letter on Agency letterhead to the Clerk of the Court of a local General District Court stating:

I am writing this letter to introduce myself and to request that the Court show lenience in the overweight citation issued to [Defendant C] on February 26, 2008 and scheduled to be heard in court on May 12, 2008. I am [Grievant], Supervisor of the DMV Hauling Permit Section. I have reviewed the citation and the circumstances surrounding the issuance of the permit for which [Defendant C] transport was cited. This permit was issued for a Self Propelled Crane. Self Propelled Cranes are not measured based on the length wheelbase but on the overall width of the Crane from the outside tire to outside tire. The wheelbase shows on the actual permit because of the Hauling Permit System design.

I ask that the overweight portion of citation [number] be granted leniency or null processed because the Permittee was under his gross weight and within the confines of his permit. However, if there are other violations in which the citing officer wishes to pursue, please do so. I apologize for any inconvenience this request may cost the court or [State Trooper T].

Should you have any questions, I can be reached at [telephone number] or via e-mail at [e-mail address]. I will be happy to offer any additional information. Thank you for your time and attention on this matter.

State Trooper T contacted the Regional Manager and complained about Grievant's letter. The Regional Manager sent a note to the MCS Director stating:

I just got off the phone with [State Trooper T] and he was upset about the letter see copy that [Grievant] sent to the [locality] Courts.

[State Trooper T] feels that he should have been called or sent a copy of a letter and not walked into court and [have] the judge tell him about the letter. [State Trooper T] went on to say that there was another problem with the permit (overhang). [State Trooper T] also said that the length does make a difference in the permit and that is how the weight that can cross bridges is determined. I would like to know how this is done as well, so I can address this if it happens again.

Bottom line is the company showed up late and was convicted of the ticket with a reduced price.⁴

The MCS Director contacted State Trooper T. State Trooper T told the MCS Director that he felt "blind sided" by Grievant's letter to the court.

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."⁵ 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."

DHRM Policy 1.60, Standards of Conduct, lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section."

The Agency's judgement is that Grievant's behavior rises to the level of a Group III offense. The Agency's judgement is supported by the evidence. By using DMV letterhead, identifying himself as a DMV employee, and saying he had reviewed the

⁴ Agency Exhibit 2.

⁵ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

circumstances of the citation, Grievant was suggesting to the Court that he was speaking on behalf of the Agency as an expert on the Agency's policy. Grievant had not been given such authority by the Agency. Grievant knew or should have known on January 31, 2008 that he lacked such authority because he was informed that day to let the Regional Manager resolve discrepancies between DMV policy and the application of DMV policy by state trooper. Grievant's actions had the effect of undermining the Agency's relationship with the Virginia State Police. Grievant's March 4, 2008 letter undermined the Commonwealth's case against the defendant.

The Agency contends Grievant's March 4, 2008 letter was inaccurate. Grievant contends his comments were accurate. Whether Grievant's comments were accurate does not affect the outcome of this case.

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 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 it is too harsh. He argued that his length of service and lack of prior disciplinary record shows he should not be punished so harshly. The Agency already mitigated the disciplinary action from a Group III with removal to a Group III with demotion and disciplinary salary reduction. To the extent any mitigating circumstances remain, aggravating factors exist to offset those mitigating circumstances. For example, Grievant failed to fully inform the Agency of his prior letters. On January 31, 2008, Grievant knew or should have known that his prior letters created a problem for the Agency yet he failed to advise Agency managers of his actions. On May 15, 2008, Grievant met with the MCS Director and Director of Vehicle Services to discuss his letter. Grievant was asked if he had sent other letters similar to the March 4, 2008 letter. Grievant said he had not done so. On July 6, 2008, the Assistant Commissioner met with Grievant and asked him if he had sent other letters like the March 4, 2008 letter. Grievant responded that he probably sent two or three other letters to the courts with a copy to the customer prior to the January 28, 2008 letter. The Assistant Commissioner later learned that Grievant had written at least eleven letters. Three were written to the Superintendent of State Police, two were sent to Commonwealth Attorneys, and six were sent to Clerks of Court or

⁶ *Va. Code § 2.2-3005.*

Judges. Grievant did not take actions to ensure that Agency managers were fully informed of the breadth of the problem he had created. 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 III Written Notice of disciplinary action with demotion and disciplinary salary reduction 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.
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
600 East Main St. STE 301
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.