

Issues: Group I Written Notice (unsatisfactory job performance), Group II Written Notice (adjusting schedules), Group II Written Notice (failure to follow policy), Suspension, Demotion and Pay Reduction; Hearing Date: 03/10/09; Decision Issued: 05/26/09; Agency: DMV; AHO: Carl Wilson Schmidt, Esq.; Case No. 8937, 8999, 9016; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8937 / 8999 / 9016

Hearing Date: March 10, 2009
Decision Issued: May 26, 2009

PROCEDURAL HISTORY

On January 28, 2008, Grievant was issued a Group I Written Notice of disciplinary action for failing to comply with policy and unsatisfactory job performance. On February 25, 2008, Grievant timely filed a grievance to challenge the Agency's action.

On July 23, 2008, Grievant was issued a Group II Written Notice of disciplinary action for adjusting an excessive number of employee schedules to open the Customer Service Center in the mornings. On July 23, 2008, Grievant timely filed a grievance to challenge the Agency's action.

On September 4, 2008, Grievant was issued a Group II Written Notice of disciplinary action with demotion and adverse pay reduction for failure to follow established written policy. On October 2, 2008, Grievant timely filed a grievance to challenge the Agency's action.

The EDR Director issued EDR Ruling number 2009-2126, 2009-2128, 2009-2182 on November 21, 2008 consolidating the grievances.

On January 30, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 10, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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 Manager Senior at one of its Facilities. The purpose of this position was:

Manages all DMV programs and services in the assigned customer service Center including human resource functions, facilities, service and financial operations, and the safety and security of DMV employees, assets, and information. All programs and services are administered in a customer service-focused manner and in accordance with statutory and

administrative procedural requirements such as the Motor Vehicle Code of Virginia, DMV policies, procedures, rules and regulations, the Privacy Protection Act and the Freedom of Information Act.¹

Grievant had been employed by the Agency for over 19 years prior to his demotion and disciplinary pay reduction effective September 7, 2008.

On December 9, 2007, Ms. H counted the money in her drawer and believed she had an overage of \$134. By the time Grievant discovered the overage, Ms. H's shift had ended and she had left the Customer Service Center. It was no longer possible for Grievant to assign the overage where it properly belonged, namely, to Ms. H because only Ms. H could log into the computer database to make the assignment. Grievant added the money to the Petty Cash fund and had another employee to assign the overage to herself and for her to correct the overage on the following day. Grievant would have assigned the overage to himself but he was scheduled to be absent on the following day. The overage was reported to the District Manager who requested a more detailed explanation of the overage.

Grievant permitted an employee to be scheduled off from work from 11 a.m. until 2 p.m. on Tuesdays and Thursdays from August until the first week of December 2007. This time included the employee's scheduled lunch break. This was to enable the employee to attend classes at a nearby school. The employee performed bookkeeping duties.

In July 2008, Grievant had assigned four Generalists to open the Customer Service Center. They had requested to come in early to account for "babysitting issues". Their shifts began at 7:30 a.m. The Facility opened at 7:45 a.m. The Generalists worked alongside a Manager or Assistant Manager when opening the facility. Grievant had assigned three Seniors to begin work at 8:15 a.m. The Seniors worked until 5:15 p.m. and assisted with closing the Facility.

On July 1, 2008 and July 12, 2008, Grievant and/or his employees made entries into or signed FS-54 sheets on at times other than when the transactions described by the FS-54 forms actually occurred.²

Grievant permitted nine of his employees to have keys to access the Facility.

Employees at the Facility were supposed to submit timesheets on a weekly basis for Grievant's review and approval. A review conducted in July 2008 showed that several timesheets were not signed by employees and/or Grievant. For some timesheets, Grievant had corrected the timesheet submitted by the employees but did not obtain signatures from the employees after the corrections were made.

¹ Agency Exhibit 29.

² See Agency Exhibit 18.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”³ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Group I Written Notice

The Agency contends Grievant failed to comply with CSCOM-706 written procedure because that procedure required that the overage be assigned to Ms. H since Ms. H caused the overage. This policy, however, assumes that Ms. H would be present at the time of the overage and be able to assign the overage to herself in the database. When Grievant realized a problem existed, Ms. H had already left the building. The policy does not address what Grievant was supposed to do under those circumstances. Grievant chose to assign the overage to another employee who would be working on the following day and be able to correct the error. His judgment was logical under the circumstances.

The Agency contends Grievant permitted Mr. T to work a schedule that allowed him to be absent from the Customer Service Center two days a week in the middle of the day during lunch schedules. Because of this, the Agency contends the Wait Time Justifications submitted by Grievant on September 24, 2007, October 1, 2007 and December 3, 2007 depleting staffing on Tuesday and/or Thursday negatively impacted the Customer Service Center's ability to provide service to customers within the Agency's established Wait Time goal. This allegation is not supported by the evidence. There are many factors that may result in an increase in wait time. In particular, if employees work slowly, the wait time may increase regardless of employee scheduling.

The Agency has not met its burden of proof with respect to the Group I Written Notice. Accordingly, it must be reversed.

Group II Written Notice

The Agency contends Grievant adjusted an excessive number of employee schedules to open the Customer Service Center in the mornings. The employees that Grievant scheduled were not authorized "key holders" and thus did not have the authority to perform many of the office-opening functions. The Agency contends Grievant underutilized his other resources, namely employees who were authorized key

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

holders. The Agency contends his actions impacted customer wait times and may have been perceived as favoritism among his staff.

Grievant had assigned four Generalists to open the Customer Service Center. They had requested to come in early to account for "babysitting issues". Their shifts began at 7:30 a.m. The Facility opened at 7:45 a.m. The Generalist worked alongside a Manager or Assistant Manager when opening the facility. Grievant had assigned three Seniors to begin work at 8:15 a.m. The Seniors worked until 5:15 p.m. and assisted with closing the Facility.

The Agency contends Grievant's scheduling practice increased wait times at the Facility. This conclusion is speculative. The Agency contends Grievant's actions could have been perceived as favoritism among his staff. This conclusion is also speculative.

The Agency did not present any evidence of days in which the Facility did not open at 7:45 a.m. as scheduled because no one had a key to open the Facility on time.

The Agency contends Grievant improperly scheduled his staff to work. The Agency has not offered any objective standard by which to measure that claim.

The Agency contends that because the Generalists were not key holders, they could not perform many of the office opening functions. Grievant scheduled a Manager or an Assistant Manager to begin work at 7:30 a.m. The Manager and Assistant Manager were key holders and were able to assist in the opening of the office.

The Agency has not carried its burden of proof with respect to the Group II Written Notice for adjusting an excessive number of employee schedules and thus it must be reversed.

Group II Written Notice

The Agency contends Grievant failed to comply with established written procedures with respect to FS-54. The Agency contends Grievant permitted more employees to have access to keys than allowed by policy. The Agency contends several timesheets from June 1, 2008 through July 12, 2008 were not properly completed and cannot be reconciled.

FS-54 forms are intended to reflect the transaction that is occurring at the moment. Signatures and entries on the forms are intended to reflect activity that is occurring at the time of the signature and entry. Grievant permitted employees to enter information onto the forms and sign them on dates after the transaction had already occurred. In other words, if a teller received money at 9 a.m. on a Wednesday but forgot to sign the FS-54 form, Grievant would permit the teller to sign the form several hours later or on the following day even though the transaction had already occurred.

Grievant was permitted by policy to have no more than 8 key holders.⁴ As of July 15, 2008, Grievant had permitted eight employees to have keys and was letting a ninth employee borrow a key from one of the employees authorized to have a key.⁵ Grievant was circumventing the eight key holder restriction.

During the period of June 1, 2008 through July 12, 2008, Grievant filed out timesheets for his employees. Timesheets are supposed to be filled out by managers as an exception such as when an employee is absent from work. Agency policy provided that:

Employees should never sign or submit blank timesheets. *** If an employee is absent, the supervisor will complete and submit a timesheet for the employee. The employee will be asked to verify and sign it upon his or her return.⁶

Failure to follow written policy is a Group II offense.⁷ Grievant acted contrary to policy as described above. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Based on the evidence presented a suspension of ten workdays is appropriate.

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....”⁸ 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

Grievant contends the Agency took disciplinary action against him as a form of discrimination. No credible evidence was presented to support this allegation.

⁴ See Agency Exhibit 20.

⁵ See Agency Exhibit 21.

⁶ Agency Exhibit 19.

⁷ See Attachment A to the Standards of Conduct.

⁸ *Va. Code § 2.2-3005.*

Grievant was demoted with an adverse pay reduction based on the accumulation of disciplinary action. Given that the Agency has only been able to establish one Group II Written Notice, there does not exist sufficient discipline to demote Grievant or reduce his pay. Accordingly, the Agency must restore Grievant to his former position and pay, and award him back pay.

DECISION

For the reasons stated herein, the Agency's issuance on January 28, 2008 to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. The Agency's issuance on July 23, 2008 to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. The Agency's issuance on September 4, 2008 to the Grievant of a Group II Written Notice is **upheld** as a Group II Written Notice with a ten workday **suspension**. Grievant's demotion and disciplinary pay reduction is **reversed**.

The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of demotion and credit for leave and seniority that the employee did not otherwise accrue.

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.⁹

[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

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.