

Issues: Group II Written Notice (failure to follow instructions) and Suspension; Hearing Date: 03/03/09; Decision Issued: 03/04/09; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq; Case No. 9034; 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: 9034

Hearing Date: March 3, 2009
Decision Issued: March 4, 2009

PROCEDURAL HISTORY

On November 13, 2008, Grievant was issued a Group II Written Notice of disciplinary action with a 10 workday suspension for failure to follow a supervisor's instruction.

On December 12, 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 February 4, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 3, 2009, 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 Superintendent at one of its Facilities. He supervises several staff. One of his duties is to acquire supplies and equipment for his Unit. Grievant has been issued a credit card to make purchases from local stores. The Agency also utilizes a Vendor to provide it with certain supplies and equipment on State Contract.

On May 13, 2008, Grievant's Supervisor sent him and two other Superintendents an email stating:

Starting today – BEFORE you purchase anything on your [credit card], please advise me first by email. In your email you need to include what you are purchasing and where or what job it will be used for.

It is very important that you abide by this mandate.¹

The Supervisor insisted on this requirement because she wanted to ensure that items were not available from the Vendor at a lower price than in local stores.

On June 18, 2008, Grievant purchased caulk and silicone from a local lumber yard. Grievant did not send an email to the Supervisor prior to purchasing the items.²

¹ Agency Exhibit 6.

On July 17, 2008, Grievant and the other superintendents met with the Supervisor. During that meeting, the Supervisor explained to Grievant the importance of the weekly workplan and that it was a requirement that it be submitted each week. The weekly workplan was to address expected activities for the upcoming week. Grievant was also expected to provide a list of accomplishments for the prior week. Grievant's weekly workplan was more important to Agency managers than the list of accomplishments because the workplan enabled Agency managers to respond to requests from members of the community seeking information about when the Agency would respond to community requests.

On July 9, 2008, Grievant met with the Manager for a Counseling meeting. On July 23, 2008, the Manager sent Grievant a memorandum with the subject line "Counseling Memorandum and Expectation". The memo stated:

This memorandum is follow up to our Wednesday, July 9, 2008 Meeting; that took place between [Grievant, the Manager, and Mr. F] regarding your actions on Friday June 20, 2008. The following were my expectations of you on that day of this meeting:

[Grievant] will prepare and submit to [the Supervisor] a weekly workplan at the beginning of each work week of the items the [Facility] is planning on accomplishing for that week. At the end of the work week, [Grievant] will submit a report of accomplishments to [the Supervisor] that covers all of the actual work completed for said week.

On July 25, 2008, the Supervisor sent an email to Grievant reminding him to submit his weekly workplan. Grievance submitted his weekly plan but it lacked the specificity desired by the Supervisor. She went to his office and together Grievant and the Supervisor drafted a workplan in sufficient detail to meet the Supervisor's expectations.

On August 25, 2008, Grievant purchased grass seed at a local lumber yard. He did not send an email to the Supervisor to obtain prior approval for the purchase.

Grievant did not submit to the Supervisor a weekly workplan for the upcoming weeks beginning August 18, September 1, September 8, September 15, and September 29, 2008.

CONCLUSIONS OF POLICY

² Grievant sent the Supervisor an email requesting to purchase 1/4" plywood. He chose to purchase one half-inch plywood. His email identifying plywood was sufficient notice to the Supervisor and does not justify disciplinary action.

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.”

“Failure to follow [a] supervisor’s instructions” is a Group II offense. Grievant was instructed to send the Supervisor an email requesting approval to purchase items using his credit card. Grievant was instructed by the Supervisor and the Manager to send the Supervisor work plans on a weekly basis. Grievant purchased items on his credit card without first notifying the Supervisor and he failed to provide five weekly work plans. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant's suspension must be upheld.

Grievant argues that the items he purchased on his credit card were necessary for the Agency's efficient operations. This argument fails. Grievant was not disciplined for purchasing items that were unnecessary to the efficient operations of the Agency. He was disciplined for failing to send an email to the Supervisor to obtain permission to purchase the items using his credit card.

Grievant argues that he submitted weekly work plans every week by email but that the Supervisor misplaced the emails. He points out that she accused him of not providing the workplan for September 22, 2008. He was able to find that workplan. Grievant contends the Supervisor lacks credibility regarding his workplan submissions. The Hearing Officer finds the Supervisor's testimony credible. Grievant did not provide work plans for five weeks. Grievant was able to find the September 22, 2008 workplan by looking at his computer's email software. If he was able to find a September 22, 2008 workplan, he should have been able to find the others if they in fact existed.

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

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

⁴ Va. Code § 2.2-3005.

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 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 **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.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.