

Issue: Group II Written Notice (failure to follow policy); Hearing Date: 06/30/09;  
Decision Issued: 07/01/09; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 9110; 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: 9110**

Hearing Date: June 30, 2009  
Decision Issued: July 1, 2009

**PROCEDURAL HISTORY**

On February 17, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow supervisor's instructions, perform assigned work, or otherwise comply with established written policy.

On February 24, 2009, 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 June 1, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 30, 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 Toll Collector Supervisor at one of its Facilities. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant worked in an office containing at least \$11,000 in cash. The office had a door that locked automatically every time it closed. An employee wishing to enter the office would have to use a key to unlock the door. The office was to be kept secured at all times to prevent theft or loss of the money stored inside. The office door was located approximately five feet from an entry/exit door. The entry/exit door had a keycode system enabling anyone who knew the code to enter the building at any time. A video camera was located inside the office to monitor and record employee activity.

Grievant's Supervisor sent employees including Grievant an e-mail stating that certain doors should not be propped open at any time. One of those doors was the door to the office where Grievant worked.

On January 5, 2009, Grievant was working inside the secured office during the Third Shift.<sup>1</sup> Approximately \$9,000 was located in a cash cart inside the office. Approximately \$2,000 was on top of a desk in the office. Grievant needed to go outside the office and into the hallway for a short period of time. Grievant used a pen to prop

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<sup>1</sup> The Third Shift was during the nighttime when few employees are at the Facility.

open the door so that he could reenter the office without having to unlock the door. The Supervisor reviewed the videotape following Grievant's shift and concluded Grievant had engaged in behavior giving rise to disciplinary action.

### 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."<sup>2</sup> 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 a supervisor's instructions or comply with written policy is a Group II offense.<sup>3</sup> Grievant was instructed by the Supervisor not to prop open the door to the office. He did so thereby acting contrary to a supervisor's instructions. Agency Policy 2.0 requires that "All cash shall be secured at all times." Agency Policy 3.0 states, "All funds shall be secured and deposited in the plaza safe at all times." Agency Policy 8.0 provides that the Toll Collector Shift Supervisor shall, "ensure that all access doors to the mainline plaza and off-ramp areas are secured at all times. \*\*\* Ensure that all vault and safe doors are locked when areas are being accessed for accounting purposes." Grievant propped the door open to the office thereby increasing the risk that someone could enter the office and remove the cash without difficulty. When the door was propped open, the cash inside was no longer secured. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor's instructions and comply with established written policy.

Grievant argues that a robber attempting to enter the building would have to know the keycode to the entry/exit door and that if a robber entered the building, Grievant would be within a few feet of the office door and could observe the robber. Grievant asserts that the risk of theft was minimal. Grievant's argument fails. The issue is not whether cash could have been stolen from the Agency. The Agency had established procedures to minimize the risk of theft. Grievant's actions increased the risk of theft beyond the risk that would have existed had Grievant kept the office door shut and locked. Grievant was notified by the Supervisor to keep the office door closed. The Agency's policies required Grievant to keep the cash secured.

Grievant argues that his prior supervisor instructed employees not to prop open doors but the practice was for employees on the Third Shift to continue to prop open the

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<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>3</sup> See Attachment A, DHRM Policy 1.60.

door. When Grievant failed to comply with his current supervisor's instruction, he did so at his own risk.

Grievant contends that the Agency did not apply DHRM Policy 1.60 properly because it failed to apply the principle of progressive discipline. Grievant argues that had the Agency counseled him not to leave the door open, he would have changed his practice without the need for the issuance of a Written Notice. Although State Agencies are encouraged to use progressive discipline, DHRM Policy 1.60 does not require progressive discipline as a condition precedent to issuing Written Notices. The Hearing Officer is not a "super personnel officer" who can substitute his opinion as to when an agency should use progressive discipline.

*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..."<sup>4</sup> 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 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 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.

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<sup>4</sup> *Va. Code § 2.2-3005.*

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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>5</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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