

Issues: Group I Written Notice (unsatisfactory performance, disruptive behavior & abuse of State time) and Termination (due to accumulation); Hearing Date: 07/09/09; Decision Issued: 07/13/09; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9119; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9119

Hearing Date: July 9, 2009
Decision Issued: July 13, 2009

PROCEDURAL HISTORY

On March 25, 2009, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance, disruptive behavior, and abuse of State time. Grievant was removed from employment effective March 25, 2009 based upon the accumulation of disciplinary action.

On April 22, 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 8, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 9, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
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 employed Grievant as a Transportation Maintenance Superintendent for one of its Areas until his removal. The purpose of his position was:

Assist in determining the needs for maintenance and repair of highways in the [Residency] direct the work of others, assists in development of estimates and contracts to provide a safe and well maintained highway system to meet the needs of the Department's customers. This position is designated as essential and, as such, all duties associated with this position are required during emergency situations which may include but are not limited to inclement weather, disaster response and emergency operations. VDOT will determine when essential positions are required.

Grievant had prior active disciplinary action. On June 22, 2007, he received a Group II Written Notice with suspension for failure to follow a supervisor's instructions and unauthorized use of State property or records.¹ On November 13, 2008, Grievant

¹ Agency Exhibit 17.

received a Group II Written Notice of disciplinary action with suspension for failure to follow a supervisor's instruction.²

On July 23, 2008, the Acting Residency Administrator sent Grievant a memorandum stating, in part:

[Grievant] is not to discuss personnel or management issues/concerns with crew members. This behavior is being disruptive and inappropriate and must stop **immediately**.³

On February 10, 2009, Grievant was operating a VDOT vehicle. At 12:50 p.m. Grievant used his VDOT cell phone to call the Supervisor and left the following voice message:

Hey [Supervisor] this is [Grievant]. I just wanted to let you know that I am riding up here to [SH] to look at a structure that [Mr. R] had asked me about. Um, it's a little bit out of my area so I just wanted you to know that's where I'm heading. Um I just called [Mr. R] to tell him I was going to look at it but he did not come in today but I know what he's talking about so. It's a structure that goes under the road that they actually drive golf carts through. And it's not our responsibility so I'm going to take a look at that because I had dealings with that a few years ago.

Mr. R held a position similar to Grievant's position but located in Area C, an area adjoining Grievant's Area. Both areas are located within the Residency. SH⁴ is a location within Mr. R's area. At 12:58 p.m. on February 10, 2009, Grievant called Mr. R and left a voice message:

Hey [Mr. R] this is [Grievant]. It is Tuesday right at 1:00. I had to make a personal errand into [SH] to look at something and uh I called [the Supervisor] and told her that I had run in here and look at a box culvert that you had asked me to look at; a box culvert that I had some prior knowledge about. So in case she checks up on me, that's what I was doing in [SH] - looking at a box culvert so. All right evidently you are not working today so whatever you are doing I hope you are enjoying it. Talk to you later boy.

Mr. R's cell phone service regularly malfunctioned. Mr. R sometimes would not receive voice messages until several days after the voice message had been left on his cell phone. Mr. R did not receive Grievant's voice message until several days later.

² Agency Exhibit 16.

³ Agency Exhibit 15.

⁴ SH is the name given to an area with a large residential area and also an adjacent commercial area.

On February 10, 2009, Grievant left his area and traveled to SH. He did not obtain or seek annual leave. He did not have permission to use the VDOT vehicle to conduct a personal errand.

When Mr. R was able to retrieve his voice message from Grievant, Mr. R became angry that Grievant was attempting to mislead the Supervisor regarding his trip to SH. A few days after receiving the voice message, Mr. R spoke with the Supervisor. He was upset because Grievant was making it appear Mr. R did not know how to do his job and because Grievant was attempting to fabricate a story. Mr. R questioned the Supervisor regarding how many times Grievant had told her Grievant was running personal errands at Mr. R's request. Mr. R told the Supervisor SH was in his area and he had not asked Grievant to come to his area to assist him.

On March 6, 2009, the Supervisor asked Grievant about the incident on February 10, 2009. Grievant told her he was trying to help Mr. R by looking at a box culvert for Mr. R of which Grievant had previous knowledge.

On March 9, 2009 before 8 a.m. Grievant called Mr. R and asked him if he remembered the voice message he had left him earlier. Grievant told Mr. R that he had gone to the bank in SH for personal business and needed Mr. R to tell the Supervisor he was there at Mr. R's request. Mr. R told Grievant he had told the Supervisor the truth and would not lie for Grievant. Grievant said he could lose his job over the incident. Mr. R told Grievant he was sorry but he couldn't help Grievant.

At approximately 8:20 a.m., Grievant called Mr. H. Mr. H reported to Mr. R and worked in Area C. Grievant and Mr. H were friends. Grievant asked Mr. H to tell the Supervisor that he had asked Grievant to go to SH look at a box culvert. Mr. H agreed to do so.⁵

On March 9, 2009, Grievant wrote a statement at the request of the Supervisor stating:

On February 10, [2009] I drove my state truck ... in the [SH Commerce Park] to look [at] a drainage pipe for [Area C]. [Mr. H] had asked me to look at a pipe beavers had stopped previously. Some time ago [Mr. R] and I had to deal with the same problem.

The Supervisor drove to Area C to speak with Mr. R and Mr. H. The Supervisor asked Mr. H if he had had contact with Grievant recently. Mr. H falsely denied having any contact with Grievant. She also asked him if he knew anything about the subject of a box culvert in SH. Mr. H told the Supervisor he left a message with Grievant to inspect the box culvert in SH. The Supervisor asked Mr. H to write a statement. On March 9, 2009, Mr. H wrote a statement at the request of the Supervisor:

⁵ Mr. H testified he agreed to lie for Grievant.

[In January] I called [Grievant] and asked him if he had any [ideas] about making a gate to go in front of a DI that we could raise and lower. [I did] not get to talk to him and he did not call back to let me know anything and I don't know if he ever looked at it or not.

As the Supervisor was speaking to Mr. H, Grievant called Mr. H's cell phone and left a message. The Supervisor asked Mr. H to play the message from Grievant so she could hear it. Grievant said that the receptionist had let him know that the Supervisor was on her way to Area C and Grievant was calling Mr. H to "give him a head's up." After listening to the message, the Supervisor suspected Mr. H was not telling her the truth. She indicated to Mr. H that he could get into trouble if he was not truthful with her. Mr. H decided to tell the truth.

Grievant continued to call Mr. H until 11:25 a.m. but Mr. H did not answer the calls. At approximately 1 p.m., Grievant drove to Area C. Mr. H saw Grievant enter Area C and approached Grievant's vehicle and got inside. Mr. H told Grievant he told the Supervisor the truth. Grievant became upset and Mr. H became upset. Mr. H left Grievant's vehicle. Mr. R observed Grievant's vehicle and Mr. H's departure. Mr. R approached Grievant and they decided to look at spreading equipment. After they finished looking at spreading equipment they were joined by Mr. H. Grievant told them he was "getting screwed" by the Supervisor because that "bitch already gave me two Group IIs." Mr. H and Mr. R told Grievant they would not lie for him.

Mr. H wrote a statement on March 9, 2009 at 2:25 p.m. as follows:

[Mr. H] received 4 cell phone calls from [Grievant] Monday 3/9/09 from 8:09 a.m. till 11:25 a.m. Did not answer calls from [Grievant].⁶

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."⁷ 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 offenses include: (1) unsatisfactory work performance, (2) abuse of State time, and (3) disruptive behavior.⁸ Grievant abused State time because he left his work

⁶ Agency Exhibit 13.

⁷ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁸ Attachment A, DHRM Policy 1.60.

area to attend to a personal errand. He used a State vehicle to accomplish that errand. He did not obtain or seek annual or personal leave to be absent from work. Grievant's behavior was disruptive because he attempted to have Mr. R and Mr. H lie to the Supervisor on his behalf. Mr. H actually lied to the Supervisor in order to protect Grievant at Grievant's request.

Accumulation of two active Group II Written Notices normally should warrant removal. With the disciplinary action issued on March 29, 2009, Grievant has accumulated two Group II Written Notices and one Group I Written Notice. Based on the accumulation of disciplinary action, Grievant's removal must be upheld.

Grievant argued that he did not ask Mr. R and Mr. H to lie for him. He asserts he was simply asking them to corroborate his actions in the event the Camp supervisor challenged him. This argument fails. Mr. R believed Grievant had attempted to get him to make untrue statements to the Supervisor. Mr. H believed Grievant had attempted to get him to make untrue statements to the Supervisor. Mr. H admitted to the Supervisor that he lied to her at Grievant's request.

Grievant argued that there is no evidence that he made a personal errand on February 10, 2009. Contrary to Grievant's assertion, the evidence that Grievant made a personal errand on February 10, 2009 is the voice message he left for Mr. R in which he said, "I had to make a personal errand into [SH] to look at something". In addition, on March 9, 2009, Grievant told Mr. R that he had to go to a bank in SH for personal business. Grievant argued that the bank in SH was merely a banking operations center which customers could not come to transact banking. Grievant's statement to Mr. R was that he was going to the bank in SH. Grievant did not tell Mr. R what the nature of his business was once he reached the location of the bank. Grievant told Mr. H he was going by a bank in SH. Grievant in fact went to the location of the bank in a business center with other businesses in SH. Grievant's action was consistent with Mr. R's and Mr. H's statements.⁹

Grievant's account of what he was doing on February 10, 2009 changed several times. At first, he told the Supervisor he was going to SH to look at a golf cart structure. Then he said he was going to look at a box culvert in a different area from the golf course. At first, he said Mr. R was the one who asked him to go to SH. Then he said that Mr. H was the one who asked him to go to SH.

Grievant argued he was attempting to address a problem caused by beavers in his area and wanted to visit SH to improve his ability to solve that problem in his area. In 2008, beavers had blocked a box culvert on a road behind SH. Grievant was consulted regarding the problem because of his former responsibilities with bridge and tunnel structures located in several areas. The beavers were relocated. No additional

⁹ Grievant testified he drove past the box culvert at SH. Given that no structure was built at the SH site, it is unclear what insight or benefit Grievant could have gained from merely driving past a location where beavers had been removed.

structure was built to prevent the beavers return. Going to an area where beavers had been removed without a new structure being built would not provide Grievant with any new insight regarding how to resolve beaver problems in his area. Grievant asserted that the beaver problem in his area was on Route 6-. Grievant's subordinate testified that the beaver problem in Grievant's and the subordinate's area was on Route 14- and arose in March 2009. Grievant's contention that he was attempting to resolve a problem with beavers in his area appears tenuous at best.

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..."¹⁰ 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 I Written Notice of disciplinary action with removal based on the accumulation 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.
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:

¹⁰ *Va. Code § 2.2-3005.*

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.¹¹

[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

¹¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.