

Issues: Group II Written Notice (failure to follow instructions & leaving worksite without permission) and Termination (due to accumulation); Hearing Date: 09/18/09; Decision Issued: 09/21/09; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9173; Outcome: Partial Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9173**

Hearing Date: September 18, 2009  
Decision Issued: September 21, 2009

**PROCEDURAL HISTORY**

On June 15, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow a supervisor's instruction and leaving the worksite without permission. Grievant was removed from employment based on the accumulation of disciplinary actions.

On June 20, 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 August 25, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 18, 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 Bridge Inspector/Diver. The purpose of his position was:

To assist the Engineer and/or the Team Leader as an Inspector/Diver in competent underwater bridge inspections. Clean and maintain SCUBA and commercial diving equipment. Compile and draft drawings and written reports using a personal computer.<sup>1</sup>

Grievant worked as a member of a four person team. When the team had four people it could operate more safely than when the team had three people because an additional person could focus solely on serving as a backup diver in case the diver experienced an emergency while diving.

Grievant reported to the Supervisor who reported to the Program Manager. The Program Manager reported to the Assistant State Bridge Engineer.

Grievant began working for the Agency on April 10, 2004. He had prior active disciplinary action. On April 16, 2009, Grievant received a Group II Written Notice for

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<sup>1</sup> Grievant Exhibit 7.

computer/internet misuse.<sup>2</sup> Grievant's evaluations show that his work performance was otherwise satisfactory to the Agency.

A dive was scheduled in the S District for several days beginning May 21, 2009.<sup>3</sup> The team was to travel to the S District and remain there overnight. Grievant was timely advised of this trip. On May 20, 2009, the Agency delayed the trip so that employees on the team could attend a retirement party for a co-worker. The new travel date was set to begin June 9, 2009. The Agency has an electronic calendar showing scheduled dive dates. The new trip dates were placed on that calendar. When Grievant's Supervisor changed travel dates, he often would send the team members an email notifying them of the new date. He did not do so for this trip. On June 4, 2009, Grievant first learned from his Supervisor that the team would depart for an overnight trip on June 9, 2009. He informed the Supervisor that he did not have adequate time to kennel his dog and that he did not have a travel credit card to enable him to pay for his hotel room and per diem expenses.

On June 8, 2009, Grievant met with the Supervisor and Program Manager and told them he could not travel to S District for the scheduled dive. He mentioned he did not have a travel card and lacked sufficient funds to travel. The Program Manager instructed Grievant to report to the departure location at 7 a.m. on June 9, 2009 and to travel with the team to S District. He told Grievant not to expect to take vacation or sick leave and if he was sick the Program Manager would require Grievant to produce a doctor's note. The Program Manager told Grievant he could receive another written notice that could lead to dismissal. Grievant said he would not go on the overnight trip.

On June 9, 2009, Grievant reported to the office and not to the dive departure location. The team departed to S District without Grievant. Grievant met with the Assistant State Bridge Engineer in the morning. Grievant told the Assistant State Bridge Engineer that he could not go on the trip because he did not have a travel card and lacked the financial ability to pay for the trip from his own funds. The Assistant State Bridge Engineer said he would have the hotel costs directly billed to the Agency, would lend Grievant funds to cover his per diem expenses, and would provide him with a State vehicle so he could drive to S District to join his team. Grievant refused to travel to S District. The Assistant State Bridge Engineer told Grievant to return to his desk and remain there working while the Assistant State Bridge Engineer considered what action to take. At noon, Grievant left the office and went to the dentist for a "tentative appointment" scheduled for 1 p.m. His treatment lasted approximately twenty minutes. After he finished his dental appointment, he drove home and did not return to the office.

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<sup>2</sup> Agency Exhibit 4.

<sup>3</sup> The dive team usually traveled for day trips. Over the past five years, the team had taken about 20 overnight trips away from the office.

Grievant returned to work on June 10, 2009, but did not present a medical excuse for his absence prior to his removal on June 15, 2009. He obtained a note from his dentist but the Agency only learned of the note as part of the hearing process.

## 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>4</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 follow a supervisor’s instructions is a Group II offense. Leaving the worksite without permission is a Group II offense.

*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>5</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.

Grievant was instructed by the Program Manager to report on June 9, 2009 to the departure location for the dive team and to depart with the dive team to the job site located in S District. Grievant knew and understood the instruction but he refused to comply with the instruction. Instead, he reported to the office on June 9, 2009. Grievant failed to comply with a supervisor’s instruction.

Mitigating circumstances exist regarding the Agency’s allegation that Grievant failed to follow a supervisor’s instructions. Grievant did not receive adequate notice of the scheduled overnight trip to the job site located in S District. Grievant was faced with the dilemma of leaving his dog in his house unattended or comply with the supervisor’s

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<sup>4</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>5</sup> *Va. Code § 2.2-3005.*

instruction. Had the Agency provided Grievant with its customary level of notice of the dates for the rescheduled trip, Grievant would have been able to arrange his personal obligations and comply with the instruction. The overnight trip was originally scheduled for May 21, 2009, but was rescheduled on May 20, 2009. Grievant denies he was notified by his Supervisor on May 20, 2009 of the revised date. Often the Supervisor notified the team by email of the revised overnight trips. In this case, the Supervisor did not send an email to Grievant to notify him of the revised date. Grievant testified that he first learned of the revised inspection date on June 4, 2009 when he was told by his immediate supervisor. Grievant informed the Supervisor that he could not get his affairs in order to attend the scheduled inspection. Grievant's dog kennel required that he provide them with two weeks notice during the busy summer months in order to house his dog. Because the Agency varied from its customary length of notice of overnight travel, Grievant was faced with the dilemma of leaving his dog unattended or complying with the Supervisor's instruction. Mitigating circumstances exist to counter Grievant's failure to comply with a supervisor's instruction to participate in overnight travel.

The Agency contends mitigating circumstances do not exist because on May 20, 2009, the Agency listed the trip on its electronic calendar. The calendar was not provided as an exhibit. It is unclear whether the information displayed would reveal that the trip was an overnight trip as opposed to a series of day trips. It is not clear that Grievant was instructed to regularly check the calendar as a work assignment. It appears that the calendar was provided for convenience and not as the primary basis for notifying Grievant of scheduled overnight trips.

On June 9, 2009, Grievant left the workplace without permission. He had been informed by the Program Manager on June 8, 2009 not to take vacation or sick leave. On June 9, 2009, he was instructed by the Assistant State Bridge Engineer to continue working at his desk while the Assistant State Bridge Engineer contemplated what action to take. Grievant left the workplace at noon contrary to the instructions of the Program Manager and without obtaining permission from the Assistant State Bridge Engineer. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the accumulation of a second active Group II Written Notice, an employee may be removed from employment. Because Grievant had a prior active Group II Written Notice, the issuance of a second Group II Written Notice justified the Agency's removal.

Grievant contends he was authorized to leave at noon on June 9, 2009 because he had a scheduled dentist's appointment and submitted the customary email notification to his Supervisor and entered the proper information into the Agency's financial management system. Grievant had adequate leave balances to take leave for half of a day. Grievant's argument fails. To the extent Grievant had permission from the Supervisor to be absent from work, the Program Manager made it clear Grievant was not to take vacation or sick leave on June 9, 2009. The Supervisor reported to the Program Manager and it should have been clear to Grievant that the Program Manager's instruction would supercede the informal practice of the Supervisor. Grievant could have obtained a variance from the Program Manager's instruction had

he obtained permission from the Assistant State Bridge Engineer, but Grievant failed to mention the dental appointment to the Assistant State Bridge Engineer. Grievant's dental appointment was not an emergency. Indeed, he referred to it as a "tentative appointment". Grievant often notified his medical providers he was scheduling a "tentative appointment" with them because his work schedule was such that he might not be able to attend appointments because he was called to travel for job sites throughout the State.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action with respect to the claim that Grievant left the workplace without permission.

### **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal 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 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>6</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>6</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.