

Issue: Group I Written Notice (exercising poor judgment); Hearing Date: 11/03/09; Decision Issued: 11/09/09; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9198; Outcome: No Relief – Agency Upheld in Full; **Administrative Review:** **EDR Ruling Request received 11/19/09; EDR Ruling #2010-2467 issued 12/10/09; Outcome: Hearing Decision Affirmed; Administrative Review: DHRM Ruling Request received 11/19/09; DHRM Ruling issued 12/18/09; Outcome: Hearing Decision Affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9198

Hearing Date: November 3, 2009
Decision Issued: November 9, 2009

PROCEDURAL HISTORY

On May 8, 2009, Grievant was issued a Group I Written Notice of disciplinary action for exercising poor judgment by allowing him to be quoted in a newspaper article using his work title in association with his name.

On May 26, 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 October 5, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 3, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representatives
Agency Party Designee
Agency Representative

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 Captain aboard a Ferry transporting vehicles and passengers across a river in the Commonwealth. Grievant reported to the Operations Manager who reported to the Facility Manager. Grievant began working for the Agency in 1990. Other than the facts giving rise to this grievance, Grievant's work performance was satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On February 19, 2009, the Agency made public its "Blueprint" regarding statewide service suspensions, reductions, and elimination. The Blueprint was published on the Agency's website. Included in the Blueprint was "Reduced Ferry Services". One of the alternatives mentioned was "Reduce hours of service to 16 hours/day vs. 24 and implement 2 boat only service".

On February 20, 2009, the Operations Manager sent a memo to Ferry employees including Grievant regarding the subject "News Media". The memo stated:

Once again the Ferry is in the news and we have already had requests from news media to come down and film an interview. This is a reminder that all such requests need to go through the district Public Affairs office. If someone shows up to film or interview you ask if they have approval from the district Public Affairs office. If they have not, instruct them to do

so. If someone has approval we will let you know in advance of their arrival. Also be careful what you say to the passengers as we have members of the news media riding the boat frequently. You would not want your name linked to a story as a VDOT representative when you thought you were having a casual conversation. This is sure to be a trying time for us here and we don't want any of our speculative comments to be construed as VDOT policy. Thank you for your cooperation.¹

On February 24, 2009, the Regional Operations Director met with Agency staff including Grievant to discuss the Blueprint. The Regional Operations Director said employees were encouraged to attend the public hearings, and speak as individuals, since they were taxpayers out of the Commonwealth and not representatives of the Department. The Regional Operations Director said the Blueprint plan is the Commissioner's plan and specific questions about the Blueprint plan should be directed to public affairs.²

On February 24, 2009, the County Board of Supervisors issued a Resolution stating, in part:

WHEREAS, the [County] Board of Supervisors understands that the Virginia Department of Transportation (VDOT) is considering reducing the hours of the [Ferry] from 24 hours per day to 16 hours per day and reducing to a "two boat only" service; ***

WHEREAS reducing the Ferry's hours of operation would have an especially negative impact the tourism industry that relies on employees who work non-traditional hours.

NOW, THEREFORE, BE IT RESOLVED that the Board of Supervisors of [County] Virginia hereby calls upon the Governor, the Commonwealth Transportation Board, and the Secretary of Transportation to refrain from reducing the Ferry's service.

Grievant resides in the County. He reviewed the resolution and believed that the Board had not identified the most significant consequence of reducing Ferry hours. Grievant believed reducing Ferry hours would limit the ability of citizens to be transported across the river to receive emergency medical care.

On March 31, 2009, Grievant sent an email to a Supervisor on the Board expressing his concern about the Ferry.

On April 2, 2009, a Newspaper Reporter called Grievant at his home. The Grievant did not give his working title to the Reporter. As Grievant stated in his Step

¹ Grievant Exhibit 2.

² See Grievant's April 29, 2009 memo to Mr. M.

Response, "I didn't have to. My name, picture and title have been used in two other front-page [Newspaper] articles."³

On April 8, 2009, the Newspaper printed an article stating, in part:

A reduction in hours of the [Ferry] could prevent [County] residents from getting to the hospital of their choice. Ferry captain [Grievant] regularly carries [County] patients in route to [Hospital]. Last month he called ahead to [City] paramedics at 2 a.m. to pick up a woman from [County] who was in serious medical distress. "That's when it hit me," he said in an interview. "I was thinking, 'What if we didn't have a 2 a.m. ferry?'" Although VDOT has not specified the exact timeframe to cut the 24 hour operation, [Grievant] has heard 8:30 or 9:30 p.m. -- 5 a.m. from October to April and midnight -- 5 a.m. otherwise. The Commonwealth Transportation Board is expected to decide the hours next month after considerable public blowback.⁴

The Agency had not yet announced the operating times of the Ferry under the reduced hours of operation.

As a result of Grievant's comments, the Agency's Public Affairs office had to respond to additional inquiries regarding medical transportation and the circumstances of the newspaper article.

On April 22, 2009, the Agency⁵ circulated an email with a counseling memorandum attached. The draft memo was dated April 15, 2009 and stated, in part;

A review of your work history indicated that to our knowledge this is your first incident of this nature. I am mitigating this disciplinary action to a formal Counseling Memorandum. *** With the reduction in this disciplinary action, I expect you to continue in a role as a responsible supervisor and take leadership in making the [Ferry] a Workplace of Choice.⁶

Grievant had provided information to Newspaper S suggesting that the Agency could save over \$1 million by reducing the security staff protecting the Ferry. Newspaper S published a story containing Grievant's information but not mentioning his name. At approximately 11 a.m. on April 22, 2009, Newspaper S updated its website to include the article. The Facility Manager became angry about the article because it had been his idea to implement security at the Ferry and he did not wish to see that service

³ Agency Exhibit 2.

⁴ Agency Exhibit 2.

⁵ Several of the emails were redacted to remove names and contact information. Although the specific names were not mention in the emails, it appears that the Agency's managers decided to issue a counseling memo to Grievant and then changed that decision.

⁶ Agency Exhibit 2.

ended. The Facility Manager told Grievant that he believed Grievant was the source of the article.⁷

On April 23, 2009, the Facility Manager presented Grievant with a due process memorandum indicating Grievant would receive a Group I Written Notice.

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.”⁸ 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.⁹ On February 20, 2009, Grievant's supervisor, the Operations Manager, instructed Grievant that requests for interviews from the news media should be referred to the district Public Affairs office. On April 2, 2009, a News Reporter contacted Grievant at his home for an interview. Grievant granted the interview without referring the matter to the district Public Affairs office. Grievant failed to comply with a supervisor's instruction thereby justifying the issuance of disciplinary action.¹⁰ The Agency had the authority to instruct its employee to refer media inquires to the Public Affairs office.¹¹ The Agency's objective was to minimize rumor and misinformation that might arise from speculation among uninformed staff. The Agency mitigated the disciplinary action to a Group I Written Notice.

⁷ Approximately 2 years ago, Grievant told the Facility Manager that the Ferry was the only one in the United States to have contracted security guards.

⁸ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁹ See Attachment A to DHRM Policy 1.60.

¹⁰ The Agency also alleged Grievant acted contrary to the instruction of the Regional Operations Director not to discuss the Agency's Blueprint and to refer such questions to the Public Affairs department of the Agency. It is not necessary to resolve this issue because the Agency has established that Grievant acted contrary to the written instruction to refer press inquiries to the Public Affairs office. If the Hearing Officer assumes for the sake of argument, that Grievant's statements to the Newspaper Reporter were protected by the First Amendment and applicable case law, the outcome of the case remains the same. Grievant was contacted by a Newspaper Reporter who knew Grievant was a Ferry Captain and asked about the Ferry's operations. Grievant made no attempt to refer the Newspaper Reporter to the Public Affairs office as he had been instructed.

¹¹ The meetings held by the Regional Operations Director did not alter the written instruction from the Operations Manager. The Regional Operations Director discussed speaking at public forums. The Operations Manager's instruction was regarding media inquires of staff.

Disciplinary may not be issued for an improper purpose. An improper purpose would be to retaliate against an employee for reporting gross mismanagement. Grievant reported unnecessary spending to Newspaper S. Grievant contends he was retaliated against because of his attempt to save the Commonwealth over a million dollars. Newspaper S published its article at approximately the time Grievant's discipline changed from a proposed counseling memorandum to a Group I offense. Grievant contends the Facility Manager was angry because of the article in Newspaper S and that the Facility Manager caused the disciplinary action to be increased to a Group I offense. On April 22, 2009 at 11:18 a.m., an email was sent with revisions to the original counseling letter to raise the action taken to a Group I offense. The identity of the person sending the email was redacted. It is not clear who made the decision to increase the level of discipline and to what extent the Facility Manager participated in that decision. Absent some evidence that the Facility Manager caused an increase in the level of discipline, the Hearing Officer cannot conclude that the Group I Written Notice was issued for an improper purpose.

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...."¹² 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I 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.

¹² *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 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.¹³

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

December 18, 2009

RE: **Grievant v. Department of Transportation**
Case No. 9198

Dear Grievant:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, your request does not identify any such policy. Rather, it appears that you are disagreeing with how the hearing officer assessed the evidence and with the resulting decision. In addition, you are challenging your freedom of speech rights under the First Amendment. This Agency has no authority to rule on constitutional issues. We must therefore respectfully decline to honor your request to conduct the review.

Sincerely,

Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services