

Issue: Group I Written Notice (failure to follow instructions); Hearing Date: 05/18/10;
Decision Issued: 05/27/10; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9317; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9317

Hearing Date: May 18, 2010
Decision Issued: May 27, 2010

PROCEDURAL HISTORY

On December 23, 2009, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow a supervisor's instructions.

On January 19, 2010, 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 April 26, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 18, 2010, 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 Operations Manager III at one of its Facilities at the time of the disciplinary action. He has been employed by the Agency for approximately 26 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On November 9, 2009, Grievant left the Facility and worked at a job site on the Road. Agency employees were cutting down trees and stacking wood in the appropriate place along the job site. When Grievant reported to work on November 10, 2009, he anticipated that he would be sent to the Road to work that day.

On November 10, 2009 at approximately 7:50 a.m., the Supervisor spoke with Grievant and instructed Grievant to do a 100% count of all PIMS inventory at the Facility before Grievant left at noon for a two week vacation. The count was to be done in preparation for a compliance audit to be conducted at the Facility by staff from the District office. Grievant did not understand this instruction. Grievant believed that the Supervisor had instructed Grievant to "shape up" the stone at the Facility for the PIMS inventory that needed to be performed in the following week. "Shaping up" the stone meant stacking it using a front loader and then measuring the dimensions of the pile of stone.

During the safety meeting at approximately 8 a.m., the Supervisor assigned employees to various job sites. The Supervisor did not assign Grievant to go to the Road. Grievant mentioned to the Supervisor that Grievant needed to go to the Road and explain to Mr. M where to stack wood and identify areas to avoid such as septic fields. The Supervisor then assigned Grievant responsibility to go to the Road and to provide Mr. M with the Right of Entry forms detailing the Agency's authority with respect to private property along the job site. Grievant did not understand this instruction. Grievant believed the Supervisor was agreeing with Grievant's idea as to what should be explained to Mr. M. At approximately 9 a.m., Grievant drove to the job site. Grievant and Mr. M drove to various locations along the Road. Grievant made comments about each location along the Road and Mr. M took notes. Grievant did not give Mr. M. the Right of Entry forms. Grievant returned to the Facility. He looked for a front end loader so that he could shape up the stone. A front end loader was not available at the Facility so Grievant was unable to determine the amount of stone at the Facility.

CONCLUSIONS OF POLICY

The Agency alleged that Grievant was instructed by the Supervisor to conduct a 100% PIMS inventory in anticipation of a more detailed inventory audit to be conducted by other Agency staff in the following week. The Agency also alleged that the Supervisor instructed Grievant to take the Right of Entry forms to Mr. M. The Supervisor and the Administrative Office Specialist III testified regarding the instructions given to Grievant. Grievant testified that the Supervisor did not instruct him to conduct a 100% PIMS inventory. Grievant denied that the Supervisor instructed him to take the Right of Entry forms to Mr. M.

One of the Hearing Officer's primary objectives during the hearing was to determine the credibility of witnesses. The Hearing Officer closely observed the demeanor of each witness. The Hearing Officer listen closely to the words expressed by each witness and watched the nonverbal communication of each witness. Following the hearing, the Hearing Officer reviewed the exhibits and compared them with the oral testimony. The Hearing Officer listened to a recording of the hearing to assess witness credibility. It is clear that each witness believed he was telling the truth regarding the instruction given to Grievant. The Hearing Officer was unable to identify any material untruthfulness with respect to the instructions given. The most likely scenario of facts is that the Supervisor provided Grievant with certain instructions but Grievant did not understand or comprehend the instructions. Grievant did not realize he had not fully and correctly understood the Supervisor's instructions.

In order to establish a failure to follow a supervisor's instruction that gives rise to disciplinary action, the Agency to show that Grievant was given an instruction, he understood the instruction, but he failed to comply with that instruction. In this case, the Agency has not established that Grievant understood the instruction. Because the Agency has the burden of proof under the Grievant Procedure Manual, this case must be resolved in Grievant's favor.

One could argue that Grievant was at fault for failing to understand the Supervisor's instructions. Principles of procedural due process require that the employee be placed on notice of the allegations against him prior to the grievance hearing. Because the Agency believed that Grievant understood the instructions, it did not allege that Grievant was at fault for failing to comprehend the Supervisor's instructions. Accordingly, there is no basis upon which the disciplinary action can be upheld because of Grievant's inattentiveness.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

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.¹

[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

¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.