

Issue: Group II Written Notice with Suspension (disruptive behavior); Hearing Date: 06/21/10; Decision Issued: 06/25/10; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9350; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9350

Hearing Date: June 21, 2010
Decision Issued: June 25, 2010

PROCEDURAL HISTORY

On February 8, 2010, Grievant was issued a Group II Written Notice of disciplinary action with a 40 hour work suspension for disruptive behavior.

On March 14, 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 June 1, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 21, 2010, 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 Transportation Operator II at one of its Facilities.

In the afternoon of December 21, 2009, the Manager decided that it would be necessary to call employees into work for snow removal. The Manager provided the Fiscal Assistant with a list of employees to call. At approximately 4:45 p.m., the Fiscal Assistant called Grievant and asked Grievant to come to work at 7 p.m. that evening. Grievant became upset. He told the Fiscal Assistant that it was too late in the day for the Fiscal Assistant to be calling Grievant to come in to work that evening. Grievant demanded to know why the Fiscal Assistant had waited so long to call him. The Fiscal Assistant told Grievant he was just following his instructions and had called Grievant within 15 minutes of being told who to call. Grievant insisted on speaking with the Manager. The Fiscal Assistant told Grievant that he would ask the Manager to call Grievant.

At approximately 5:26 p.m., the Manager called Grievant. Grievant was unruly and disrespectful towards the Manager. The Manager asked Grievant to calm down and listen. Grievant refused to do so and continued to be loud and unruly. Because the Manager could not continue the conversation, the Manager hung up the telephone.

Grievant reported to work as scheduled at 7 p.m. December 21, 2009.

On January 12, 2010 at approximate 5:15 p.m., Grievant met with the Manager and the Fiscal Assistant. The purpose of the meeting was to discuss what happened on December 21, 2009 when the Fiscal Assistant called Grievant to report to work that evening. The Manager had the Fiscal Assistant present during the meeting so that Grievant could apologize to him although the Fiscal Assistant was not expecting an apology. The Manager asked Grievant if he knew why they were meeting. Grievant said that he did not know. The Manager reminded Grievant of his unruly behavior towards the Fiscal Assistant and the Manager when Grievant was asked to report for snow duty on December 21, 2009. Grievant immediately became enraged. He began yelling that they had waited too long to call him at home to inform him that he was needed for snow duty at 7 p.m. He said he had not had any rest that day. The Manager reminded Grievant that Grievant was subject being called to work on a shift like any other employee and that Grievant knew the weather conditions have been poor the previous few days. Grievant yelled that the Manager was discriminating against him and did not like him and that he would take care of getting the Manager straightened out the following day because Grievant had a meeting scheduled at the district office or at the central office. Grievant said the Manager and the Fiscal Assistant were not to call him on his cell phone because he would not answer and also not to call him for anything pertaining to work because he would not answer. The Manager calmly responded that there would be times that Grievant may be contacted to report for various work-related duties or incidents. Grievant continued to loudly express his insistence that they were not to call him because he would not answer. The Manager told Grievant that his behavior during the meeting and action of not responding to calls in the future would be handled by disciplinary action. Grievant yelled that if the Manager put anything and Grievant's file he was going to be removed and the Manager would hear from Grievant's lawyer because Grievant was going to sue the Manager. The Manager calmly replied that Grievant would have to do what he felt necessary and that the Manager would also do what was necessary involving disciplinary action regarding Grievant's unacceptable behavior during the meeting. The Manager also told Grievant that he was going to recommend additional anger management counseling for Grievant. Grievant immediately stated he was not going to see a doctor and no one could make him. Grievant said that the doctor he saw for anger management told him that he did not have a problem but rather the Manager had the problem. The Manager summed up the meeting by saying to Grievant that Grievant's actions and behavior were jeopardizing his job. Grievant said that he did not care. Grievant said that he did not have to answer to the Manager, he only answered to his God, not the Manager or anyone else.

During the meeting on January 12, 2010, Grievant frequently waved his hands in the air making gestures. Although the Fiscal Assistant was not concerned for his safety, he became concerned for the Manager's safety because of Grievant's display of anger and frustration. The Manager remained calm throughout the meeting. Grievant was so loud during the meeting that an employee in an adjacent office stopped his work and approached the closed office door of the meeting to determine the nature of the commotion.

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.”¹ 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.”

Disruptive behavior is normally a Group I offense. Grievant was disruptive on January 12, 2010 because he yelled at the Manager for several minutes, he was unwilling to listen to what the Manager was saying, he raised concern by the Fiscal Assistant for the Manager's safety, and the caused another employee in an adjacent office to leave his work duties to determine the source of the commotion.²

Attachment A of the *Standards of Conduct* provides:

An agency may issue a Group II Written Notice (and suspension without pay for up to 10 workdays) if the employee has an active Group I Written Notice for the **same offense** in his/her personnel file.³ (Emphasis original).

On April 2, 2008, Grievant received a Group I Written Notice stating, in part:

On January 11, 2008, after seeing you take something from the state truck and put it into your own personal vehicles, I questioned you about the contents and then I reminded you of the proper disposal of materials policy. When reminding you of the policy, you became very aggravated and loud. You repeated[ly] questioned if I wanted the items and your voice became a shout and your body language and tone were very elevated. You were counseled back on August 2, 2007 regarding such behaviors and you were devised at that time that getting out of control, irate and extremely loud would not be tolerated. You are advised in back counseling session that future outburst of this nature would be handled in the Standards of Conduct. Further incidents of this nature will result in additional formal disciplinary action, up to and including termination.

Grievant's behavior on January 12, 2010 was substantially the same as the behavior Grievant engaged in which gave rise to the Group I Written Notice issued on April 2,

¹ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

² Although what Grievant said to the Manager may be considered protected speech, how he expressed those words made him subject to disciplinary action.

³ Agency Exhibit 4.

2008. Accordingly, the Agency has presented sufficient evidence to support the elevation of the level of discipline from a Group I to a Group II Written Notice for Grievant's behavior on January 12, 2010. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Thus, Grievant's suspension for 40 hours must be upheld.

Grievant argued that he has a loud voice and that others may perceive him as yelling when he is not actually yelling. The evidence showed that the Fiscal Assistant and Manager were familiar enough with Grievant's normal voice to distinguish when he was speaking in a normal voice and when he was yelling. It is clear that on January 12, 2010, Grievant was angry and yelling for several minutes.

Grievant argued that the Manager had created a hostile work environment for him. No credible evidence was presented to support this allegation. Although Grievant may have disagreed with the Manager's management decisions and management style, the Manager did not create a hostile work environment for Grievant.

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...."⁴ 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 with 40 hour work suspension 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:

⁴ *Va. Code § 2.2-3005.*

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.⁵

[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

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