

Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 08/13/10; Decision Issued: 08/18/10; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9372; Outcome: No Relief – Agency Upheld;
Administrative Review: AHO Reconsideration Request received 09/01/10; Outcome pending.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9372

Hearing Date: August 13, 2010
Decision Issued: August 18, 2010

PROCEDURAL HISTORY

On March 5, 2010, Grievant was issued a Group II Written Notice of disciplinary action with a three work day suspension for failure to follow a supervisor's instructions.

On April 5, 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 she requested a hearing. On July 14, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 13, 2010, a hearing was held at the Agency's 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 employs Grievant as a Traffic Coordinator at one of its Facilities. She has been employed by the Agency for approximately three years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant worked in the Central Office until she was moved to the Regional Unit in another county in July 2009. While she was working at the Central Office she communicated with staff of the Regional Unit. Several staff in the Regional Unit perceived Grievant as difficult to work with. When Grievant moved to the Regional Unit, her duties included providing customer service as part of the Customer Service Center. Staff working in the Customer Service Center were responsible for answering telephone calls coming from motorists regarding potholes or other problems involving Virginia highways.

Grievant reported to Supervisor H or Supervisor S depending on who was working during Grievant's shift. That supervisor reported to Operations Manager L who reported to the Manager.

The Building in which Grievant worked was often cold inside during the winter. The Agency placed portable electric heaters in several offices in the Building for employees to use. The heaters were about the size of a thick telephone book.

On January 31, 2010, Grievant was working at a workstation¹ in the Customer Service Center located in an office within the Building. Electrical outlets were part of Grievant's workstation and located in the baseboard of the workstation. An electric power cord was plugged into an electric outlet in the baseboard of the workstation. Grievant plugged an electric heater into the power cord and turned it on because she was cold. Adding the additional demand from the electric heater had the effect of activating the circuit breaker which stopped the flow of electricity to Grievant's workstation. Grievant's telephone operated using electricity from Grievant's workstation. When the circuit breaker activated, Grievant's telephone stopped working and incoming telephone calls to Grievant's telephone were dropped or not connected. Grievant used another telephone to call an employee working in the Control Room. That employee notified the Manager that the power was out upstairs in the Customer Service Center. The Manager walked upstairs to the office where Grievant was working. He observed that Grievant's workstation did not have power. He also observed that the workstation in an adjacent office also was without power. Grievant's workstation and the other workstation shared an electric circuit. The Manager walked to the panel and noticed that one of the circuit breakers had tripped. He did not immediately reset the breaker. Instead, he walked to the adjacent office and asked the employee sitting in the workstation without power whether she had recently plugged anything into the electric outlets of her workstation. She said she had not done so. The Manager then asked Grievant the same question. Grievant said that she had just turned on a portable heater. The Manager instructed Grievant to unplug the portable heater and plug it into a different receptacle in the back of the room. She did so. The Manager believed that the receptacle in the back of the room would be on a different circuit from the receptacles that were part of Grievant's workstation baseboard. The Manager then reset the circuit breaker. Electric power to both workstations returned to normal. The Manager again instructed Grievant to leave the heater plugged into the receptacle in the back of the room in the future. He explained that both workstations were on the same circuit and the portable heater would trip the breaker again.

While Grievant and the Manager were talking on January 31, 2010, the Supervisor H came into the room and overheard some of their discussion. She overheard the Manager inform Grievant not to plug the heater into the power strip but rather to plug it into the wall socket.

On February 11, 2010 at approximately 7:25 a.m., Grievant contacted Supervisor S and stated that the power to the upstairs Customer Service Center had been disrupted and that her phone and computer were not working due to a sudden loss of power. Supervisor S approached Mr. M and asked him to go upstairs to correct the problem. Mr. M walked upstairs to Grievant's office. He observed that two portable electric heaters were connected to the receptacle on the baseboard of Grievant's workstation.² Grievant told Mr. M that "this has happened before" and told Mr. M that

¹ Several employees worked at that workstation when Grievant was not working.

² Grievant testified that one of the heaters was connected to a power strip and the other was connected directly to the receptacle outlet in the baseboard of Grievant's workstation.

the circuit breaker needed to be reset. She directed him to the location of the circuit breaker panel. Mr. M unplugged the two heaters and then reset the breaker to restore power to Grievant's workstation. The power was out for approximately 5 to 10 minutes. During that time Grievant was not able to answer telephone calls from motorist reporting the location of potholes or seeking other assistance.³

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."⁴ 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.⁵ Grievant reported to the Manager. The Manager instructed Grievant on January 31, 2010 to plug electric heaters into the electric receptacle in the back of the office and not the receptacle located in the baseboard of her workstation. On February 11, 2010, Grievant failed to plug to heaters into the electric receptacles in the back of the office and instead used the electric receptacle located in her workstation. The Grievant failed to comply with the Manager's instruction. As a consequence of Grievant's failure to comply with the Manager's instruction, Grievant was unable to receive and respond to any calls from motorists seeking assistance. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, Grievant's three work day suspension must be upheld.

Grievant did not recall her conversation with the Manager as being an instruction from the Manager for her to plug-in the heater on the back wall receptacle. She recalled the Manager saying something to the effect of "you might not want to do that" which she construed as a suggestion and not an instruction. The Manager testified that he intended his comments to be an instruction to Grievant. His testimony was credible. His testimony was confirmed by the testimony of Supervisor H. She overheard the Manager's instruction to Grievant and she also construed the Manager's statements to be an instruction. It is unfortunate that Grievant did not construe the Manager's statements to be an instruction, but there is sufficient evidence for the Hearing Officer to

³ During that time period, Grievant was receiving approximately two telephone calls every 10 minutes.

⁴ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁵ See, Attachment A, DHRM Policy 1.60.

conclude that Grievant should have known that the Manager was giving her an instruction and not merely making a friendly suggestion.

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....”⁶ 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 argued that the Agency did not send written notification to all staff who worked at the workstation notifying them not to plug heaters into the baseboard outlets. She also argued no other staff had been instructed to refrain from plugging heaters into the baseboard outlets. If the usage of heaters at the workstation was a significant issue, it would appear logical that the Agency would have notified all employees working at the workstation and not just Grievant. The Agency’s failure to notify other staff, however, is not a mitigating circumstance given that Grievant receive specific instructions not to plug in heaters at the workstation. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant presented the testimony of a Contractor who worked with Grievant but left the Agency prior to the hearing. The Contractor testified that Mr. D was an employee working at the Facility where Grievant worked and held a position similar to that of Supervisor H and Supervisor S. Mr. D called the Contractor three days prior to the hearing and asked him to talk to Grievant. Mr. D told the Contractor that Grievant was in trouble and that he did not wish to see Grievant lose her job. Mr. D did not mention that Grievant had filed a grievance. Mr. D did not say he was acting on behalf of anyone else.

Mr. D’s actions are troubling. The question arises, however, as to what impact his actions have on this hearing. Mr. D did not testify. Did he contact the Contractor because of his personal concern for Grievant’s well-being? Or was he acting on behalf of Agency managers in order to intimidate and retaliate against Grievant for filing a grievance? Based on the evidence presented, the answers to these questions cannot be determined. Mr. D’s actions did not affect the outcome of this case. In addition, there is insufficient evidence to conclude that the Agency’s disciplinary action was

⁶ Va. Code § 2.2-3005.

issued for an improper purpose, namely because of prior conflict that arose when Grievant worked in the Central Office. The decision to issue disciplinary action and the nature of the action taken appears to have been decided by the Operations Manager L and the Manager. No evidence was presented to show that either of these two employees were motivated by an improper purpose as part of the decision to take disciplinary action against Grievant.⁷

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a three work day 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:

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

⁷ Grievant presented evidence of an email she sent to the Operations Manager L in October 2009 expressing concerns about some of her coworkers and asking for a meeting to discuss her concerns. The Operations Manager L expressed an interest in meeting with Grievant but was unable to coordinate a date to meet with Supervisor H and Supervisor S. As of the date of the hearing, the Operations Manager L had not yet scheduled a meeting to discuss Grievant's concerns. The failure to schedule a meeting appears to be the results of poor management and not an expression of animosity towards Grievant.

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.