

Issues: Group III Written Notice (falsifying records), Group II Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 10/04/10; Decision Issued: 10/14/10; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9414, 9415; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 10/29/10; Outcome pending; Administrative Review: DHRM Ruling Request received 10/29/10; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9414 / 9415

Hearing Date: October 4, 2010
Decision Issued: October 14, 2010

PROCEDURAL HISTORY

On April 15, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsification of documents. Grievant also received a Group II Written Notice with removal for failure to comply with policy.

On May 13, 2010, Grievant timely filed two grievances to challenge the Agency's actions. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On August 26, 2010, the EDR Director issued Ruling No. 2011-2749, 2011-2750 consolidating the two grievances for hearing. On September 8, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 4, 2010, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?
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?
5. Whether the Agency retaliated against Grievant.

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. The burden of proving retaliation is on the Grievant. 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 Right of Way Agent Specialist. The purpose of Grievant's position was:

Facilitate the acquisition of right-of-way in proposed highway locations through field inspections, planning, conferences and final agreement. Research, compile and analyze data to determine just compensation. Ownership is ascertainable through research of court records. Prepare detailed legal description of each parcel as recognized by law they can be located by reference to survey plats or approved record maps. Contact property owners, make offer and negotiate for right-of-way to be acquired on the terms of a voluntary transfer of the property or through eminent domain. Prepare reports, consult with trial attorneys and serve as a representative for the Commonwealth in condemnation cases, when necessary.¹

¹ Agency Exhibit 6.

Grievant had been employed by the Agency for approximately 18 years until her removal effective April 15, 2010. With the exception of the facts giving rise to this disciplinary action, Grievant's work performance was satisfactory to the Agency. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On January 7, 2010, Grievant wrote on the Log that her Depart Time was 1:30 p.m. and that she was traveling to the Destination of Location G. She estimated her return time as 3:30 p.m. Her actual Return Time was 3:45 p.m. On January 7, 2010 at approximately 1:48 p.m., Grievant traveled to the Meat Store and purchased meat for her dogs. Grievant charged her time to Federal Project 164.

On February 16, 2010, Grievant wrote in the Log that her Depart Time was 10:00 a.m. and that her Destination was Location 9. She listed her Estimated Return Time as 11:00 a.m. She returned to the office but did not write her Return Time in the Log. Grievant then wrote her Depart Time as 12 p.m. She wrote her Destination as leaving for a doctor's appointment. Grievant entered into the FMSII system that she was taking sick leave from 12:45 p.m. through 5:45 p.m. On February 16, 2010 at 10:27 a.m., Grievant purchased meat from the Meat Store. Grievant charged her time to Federal Project 847.

On March 15, 2010, Grievant wrote in the Log that her Depart Time was 7:15 a.m. She wrote her Destination as Personal Leave with an Estimated Return Time as noon. On the next line of the Log, Grievant wrote 11 a.m. as her Estimated Return Time and 11:45 a.m. as her Return Time. On the next line of the Log, Grievant wrote her Depart Time as 3 p.m. with her Destination as Location 9. She wrote that her Estimated Return Time was 3:45 p.m. Her Return Time was 3:45 p.m. On March 15, 2010 at 3:17 p.m., Grievant purchased meat from the Meat Store. Grievant used her personal vehicle instead of driving the State vehicle assigned to her. Grievant charged her time to Federal Project 164.

On March 18, 2010, the Supervisor told Grievant not to take her personal vehicle when driving to perform her work duties at the Agency's projects. Grievant discontinued using her personal vehicle during her work hours.

On March 31, 2010, Grievant wrote in the Log that her Depart Time was 8:30 a.m. She listed her Destination as Federal Project 164 with an Estimated Return Time of 10:30 a.m. She wrote that her Return Time was noon but she actually returned at 12:52 p.m. The Supervisor testified that Grievant's assignment should not have taken longer than an hour to complete. The evidence supports the Supervisor's conclusion.

On April 1, 2010, Grievant met with the Supervisor and the Human Resource Director. Grievant was asked if she signed out on the Log to go to Federal Project 164. She said she had done so. Grievant was asked if she met the landowner. Grievant said she had not. Grievant said that she rode by and looked at the fence that was to be

relocated. Grievant was asked if she had completed her other assignments on the project. Grievant said she had. Grievant stated that she had purchased gas and took the long way to get to the project and returned to the office.

On April 14, 2010, the Investigator interviewed Grievant. When the Investigator discussed receipts from the Meat Store, Grievant stated, "the receipts did not bother me because I pay for the meat on the phone and I have never used the state vehicle to go to the meat place. I always pick up my meat afterward."

Grievant was assigned a Chevrolet Cavalier owned by the Commonwealth of Virginia. She parked the vehicle in the Agency's parking lot and could use the vehicle to drive to job sites during the day. She was the only employee using the white colored vehicle. Grievant was aware of her obligations under policy to report damage to the vehicle.

On March 31, 2010 at approximately 9 a.m., Grievant drove the State Vehicle to the gasoline station to refuel the vehicle. The cap to access the gasoline tank was on the right side of the vehicle above the right rear tire. Grievant drove the vehicle to the fuel pump island and aligned the vehicle as if she were going to pump gas into a vehicle with the gas cap on the left side. She then realized that the gas cap on the right side of the vehicle so she drove the vehicle forward to her left past the island. She backed the vehicle so that the right side of the vehicle was closest to the gas pump. At the end of the fuel pump island was a sturdy metal pipe secured in the concrete next to the island. The pipe served as a barrier to prevent cars from hitting the fuel pumps. The pipe was painted bright yellow. Next to the pipe was an orange and silver striped barrel. As Grievant was backing the vehicle into position, the vehicle scraped the yellow pipe. Some of the yellow paint transferred onto the right rear passenger door of the white vehicle. The paint formed a horizontal streak of approximately 1 foot to 1 1/2 feet long on the vehicle's door guard and metal door. The right rear tire was also scraped. Grievant did not report the damage to the Agency or anyone else working for the Commonwealth of Virginia.

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."² 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."

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

Abuse of State time is a Group I offense.³ On several occasions, Grievant left the Agency's Facility and took an unauthorized break to purchased meat at a store instead of going directly to the job site. On several occasions, Grievant left the Agency's Facility and then took much longer than necessary to complete her task. For example, on March 31, 2010, Grievant took over three hours to perform a task that should not have taken more than an hour. When asked by the Investigator about what she did on March 31, 2010, Grievant admitted she "drove around a lot to kill time". The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for abuse of State time.

Falsification of records is a Group III offense. The Agency argued that Grievant's abuse of State time constituted falsification of records because she charged her time to several federal projects. The Agency did not submit the actual records or print outs of the records supposedly falsified. The Agency did not submit evidence of any warnings Grievant may have received when she was charging her time to particular contracts. An example of a warning that would make Grievant aware of the consequences of her actions would be wording to the effect that by charging time to a federal project, an employee was asserting that her time was fully devoted to that project. The Agency admitted that an employee's time while on break⁴ could be appropriately charged to a federal project even though the employee was not actually working on that project during his or her break.⁵ The Agency did not allege that Grievant had violated federal law and identify the laws broken. In some cases, Grievant charged her time to the wrong federal project. Grievant made an error when charging the wrong federal projects but did not intend to falsify a record.⁶ The Agency did not submit a policy placing Grievant on notice that incorrectly charging her time to federal projects could be considered falsification justifying disciplinary action. The Group III Written Notice issued to Grievant must be reduced from a Group III Written Notice to a Group I Written Notice.

Group II Written Notice for Failure to Follow Policy

Failure to follow policy is a Group II offense.⁷ The policy of Fleet Management provides that the "Operator is required to fill out an "Automobile Loss Notice" form on

³ See, Attachment A, DHRM Policy 1.60.

⁴ The Supervisor testified that she informed Grievant that employees were not authorized to take breaks but could take a one-hour lunch instead of a 45 minute lunch break. The evidence showed, however, that the Supervisor permitted subordinates to take breaks during the workday.

⁵ The Investigator testified that an employee's break time could be charged to a federal project.

⁶ By charging time to the wrong project, Grievant engaged in behavior contrary to her Employee Work Profile. When an employee acts contrary to his or her Employee Work Profile, that behavior typically constitutes a Group I offense. The Supervisor testified that she talked to Grievant about the importance of recording time accurately. Grievant's failure to accurately report her time is not sufficient to establish that Grievant had the intent to falsify documents.

⁷ See, Attachment A, DHRM Policy 1.60.

any crash regardless of the amount of property damage or personal property. *** An envelope containing a crash checklist and instructions is placed in the glove compartment of each pool vehicle ... and a supply is furnished to the agencies with vehicles on regular assignment."⁸ Grievant knew of her obligation to comply with this policy. On March 31, 2010, Grievant crashed her state vehicle into a pipe causing some damage to the vehicle. Although the damage does not appear to be great, Grievant was obligated to report the damage immediately. She failed to do so thereby acting contrary to policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant argued that she did not report the damage because she did not see it. Grievant testified that the vehicle's bumper had hit something so she looked at the bumper. Since she did not see any damage to the bumper she did not believe any damage existed. Grievant argued that she did not intend to hide the damage because it would have been easy to do so. Grievant's argument fails. The gas cap is located directly above the back of the rear wheel of a vehicle. The yellow paint appears at the middle of the rear door and extends to the back of the rear door within fewer than 6 inches of the rear tire. When Grievant was putting the fuel pump nozzle into the vehicle, she would have looked down towards the rear right tire. The yellow paint should have been obvious to her. When she removed the nozzle from the vehicle, she would have looked down again to see the yellow paint. Grievant's assertion that she did not see the yellow paint is not credible.

Mitigation

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...."⁹ 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.

Retaliation

⁸ Agency Exhibit 5.

⁹ *Va. Code § 2.2-3005.*

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹⁰ (2) suffered a materially adverse action¹¹; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.¹²

Grievant engaged in a protected activity because she filed a grievance against the Supervisor in March 2010. Grievant suffered a materially adverse action because she received disciplinary action. Grievant has not established a causal link between her protected activity and the disciplinary action. Grievant's abuse of State time was brought to the attention of the Supervisor by another employee who found a receipt showing Grievant had purchased meat during work hours. Grievant's failure to report damage to her vehicle was discovered by the Investigator as part of his investigation of Grievant's abuse of State time. The Agency did not take disciplinary action against Grievant as a pretext for retaliation.

Relief

Upon the accumulation of two active Group II Written Notices, an Agency may remove an employee. Once the Group III Written Notice is reduced to a Group I, insufficient active disciplinary action exists to support Grievant's removal. Accordingly, Grievant must be reinstated.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award

¹⁰ See *Va. Code § 2.2-3004(A)(v)* and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

¹¹ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

¹² This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

unjust.” Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney’s fees unjust. Accordingly, Grievant’s attorney is advised to submit an attorneys’ fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director’s *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action for falsification of records is **reduced** to a Group I Written Notice for abuse of State time. The Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for failure to follow policy is **upheld**. Grievant’s removal is **reversed**. The Agency is ordered to **reinstate** Grievant to Grievant’s former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.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].

S/Carl Wilson Schmidt

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.