

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 10/20/10; Decision Issued: 10/25/10; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9426; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9426

Hearing Date: October 20, 2010
Decision Issued: October 25, 2010

PROCEDURAL HISTORY

On June 3, 2010, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On June 23, 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 October 5, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 20, 2010, a hearing was held at the Agency's 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 Senior Policy and Planning Analyst. He has been employed by the Agency for approximately 6 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency began the process of changing its financial management software system from FMSII to Cardinal. In the fall of 2009, Grievant was assigned responsibility for one of over 20 projects regarding the transition to the new system. As part of the transition to the new system, the Acting Commissioner would meet with project analysts to receive updates regarding various projects and provide feedback to assist the analysts.

In January 2010, the Acting Commissioner met with several project analysts including Grievant. Grievant brought documents to the meeting to summarize his progress on the project. Grievant gave those documents to the Acting Commissioner and informed the Acting Commissioner of the work he had completed as of that meeting.

Another meeting was scheduled on February 19, 2010 to update the Acting Commissioner. Grievant was expected to inform the Acting Commissioner of his progress since January 2010. On February 18, 2010 at 8:47 a.m., the Supervisor sent Grievant and two other project analysts an email stating:

As you are aware, BPR status updates were provided to [Acting Commissioner] this past Monday. Your updates to the Commissioner are scheduled for tomorrow, Friday the 19th, in the CO 3rd floor conference room, beginning at 10 a.m. Please be prepared to walk [Acting Commissioner] through the current process(es) and then articulate what the future process(es) will look like. As we've mentioned previously, at the outset of your presentation, provide the objective of the BPR and the impact to Cardinal.

We'll present one at a time, and in this order [Grievant] (Credit Cards), [Analyst B] (3rd Party), and [Analyst D] (Disaster Management). [Grievant] will lead off, but [Analyst B] and [Analyst D] will be on-call upstairs. As we are wrapping up, we'll send an e-mail or call [Analyst B] to come down stairs for her presentation, and as she is wrapping up, [Analyst D] will be contacted to come to the 3rd floor.

I'd suggest having copies of your reports/materials/etc. but [Acting Commissioner] may just listen and not go through the reports during the briefings. If you want to work from bullets and hand them out, that will work. I mentioned the following point during the debrief, but listen to what [Acting Commissioner] has to say and what he asks. You may get into some process building during the update, and that's all right. He may want you to address some additional operational issues that might not have been part of the original scope. Again that helps us to frame our work. As Commissioner, [Acting Commissioner] is looking at the larger picture (not just Cardinal) and the impact that the Blueprint initiative is having on personnel and staffing, so his view has expanded and he is looking for us to define the "right" way (effectiveness, efficiency) to accomplish a task.¹

On February 19, 2010, the Acting Commissioner held a meeting attended by the Supervisor, the Manager, and Manager C. Grievant was called into the meeting to give his presentation. Grievant did not bring any documents with him to hand out to the Acting Commissioner. Approximately six minutes into Grievant's presentation, the Acting Commissioner said that Grievant was not presenting any information that he had not already heard. Manager C stated to the Acting Commissioner that he believed Grievant was unprofessional and that Grievant's presentation was a reflection on the Supervisor, the Manager, Manager C and the whole division. Manager C assured the Acting Commissioner that "it would not happen again". Grievant left the meeting and Analyst B entered the meeting and began her update for the Acting Commissioner. Analyst B had bullet points and handouts for the Acting Commissioner. When Analyst B left the meeting, Analyst D entered the meeting. Analyst D also had bullet points and handouts for the Acting Commissioner.

¹ Agency Exhibit 2. A bullet point document includes a series of single sentences or brief paragraphs to summarize a point of discussion.

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.”

“Unsatisfactory work performance” is a Group I offense.³ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On February 19, 2010, Grievant’s work performance was unsatisfactory to the Agency. Although Grievant had made progress on his project since January 2010, Grievant did not provide the Acting Commissioner with any new information about his project. In order to facilitate a discussion with the Acting Commissioner, the Supervisor suggested that Grievant have bullet points and other documents to hand to the Acting Commissioner. Grievant disregarded that suggestion and arrived at the meeting without any documents to present to the Acting Commissioner. When Grievant’s actions are measured against the actions of the other two policy analysts who made presentations to the Acting Commissioner on February 19, 2010, the inadequacy of Grievant’s presentation is evident. The other two policy analysts were prepared for the meeting and presented bullet points and documents reflecting their progress to the Acting Commissioner.

Grievant argued that he was interrupted by Manager C and was unable to complete his presentation. Manager C interrupted Grievant because it was clear to the Acting Commissioner and the other individuals in the meeting that Grievant was not presenting information about his work since the January 2010 meeting. Grievant knew the purpose of the meeting was to update the Commissioner – not to repeat information that the Commissioner had already learned in January 2010.

Grievant argued that the Agency took too long to issue the disciplinary action against Grievant. The Agency explained its delay because Grievant filed a grievance against Manager C shortly after the February meeting and the Agency did not wish to take disciplinary action until the grievance was resolved in order to avoid the

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

³ See, Attachment A, DHRM Policy 1.60.

appearance of retaliation. The Agency's delay was reasonable under those circumstances.

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.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁵ (2) suffered a materially adverse action⁶; 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.⁷

Grievant argued that the Agency retaliated against him for filing a grievance against Manager C. Grievant engaged in a protected activity because he filed a grievance. Grievant suffered a materially adverse action because he received

⁴ Va. Code § 2.2-3005.

⁵ 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.

⁶ 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.

⁷ 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).

disciplinary action. Grievant has not established a causal link between the adverse action and the protected activity. Agency managers began discussions regarding taking disciplinary action against Grievant prior to his initiation of his grievance against Manager C. Agency witnesses denied taking disciplinary action against Grievant because he filed a grievance. Their denials were credible. The Agency took disciplinary action against Grievant because his work performance was unsatisfactory and not as a pretext for retaliation.

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.
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.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].

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.