

Issues: Group I Written Notice (failure to follow policy) and Termination (due to accumulation); Hearing Date: 02/03/11; Decision Issued: 02/04/11; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9498; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 02/09/11; Reconsideration Decision issued 02/10/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 02/09/11; EDR Ruling No. 2011-2904 issued 03/08/11; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 02/09/11; DHRM letter sent 03/09/11; Outcome: Declined to review. Administrative Review: 2<sup>nd</sup> EDR Admin Review Request received 07/21/11; Outcome pending.**



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9498**

Hearing Date: February 3, 2011  
Decision Issued: February 4, 2011

**PROCEDURAL HISTORY**

On October 25, 2010, Grievant was issued a Group I Written Notice of disciplinary action for failure to follow policy and failure to report an accident in a state vehicle. Grievant was removed from employment based upon the accumulation of disciplinary action.

On November 17, 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 January 10, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 3, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Party 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 Department of Behavioral Health and Developmental Services employed Grievant as a Security Officer at one of its Facilities. She began working for the Agency in 2007. The purpose of her position was, "make routine rounds of the property while on duty, being a presence for others and watching for any unusual activity."<sup>1</sup> Grievant had prior active disciplinary action. She received a Group III Written Notice of disciplinary action with a five work day suspension on April 8, 2009 for sleeping during working hours.

In the early morning of October 5, 2010, Grievant was driving the Facility's golf cart across the Facility campus. The golf cart did not have headlights. Grievant drove the golf cart into a tamper switchbox attached to a pipe referred to as a Post Indicator Valve that stood approximately 2 to 3 feet tall and was less than a foot wide. The pipe was part of the Facility's sprinkler system. The passenger side of Grievant's golf cart hit the tamper switchbox separating it from the Post Indicator Valve. A small amount of green paint from the golf cart remained on the switchbox. Red paint from the switchbox formed a 5 inch horizontal line across the right front of the golf cart as the golf cart and the switchbox scraped. The collision caused the fire alarm for the Building to activate. Grievant did not report the accident.

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<sup>1</sup> Agency Exhibit 1.

## 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.”<sup>2</sup> 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 policy is a Group II offense.<sup>3</sup> Facility Instruction Number 9006, Golf Cart Control and Safety, prescribes “regulation for traffic control, operation, parking improper maintenance of [Facility] Golf carts and off road utility vehicles.” This policy states, “[a]ny accidents involving a cart or off-road utility vehicles shall be reported to the department supervisor and Safety Manager immediately. No cart or off-road utility vehicles shall be moved from the accident site until the Safety Manager arrives to investigate.” October 5, 2010, Grievant drove a golf cart into a structure causing damage to the structure and to the golf cart. Grievant failed to report the accident to the department supervisor and the Safety Manager thereby acting contrary to Facility policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action. The Agency mitigated that disciplinary action to a Group I Written Notice.

When an employee has an active Group III Written Notice, the accumulation of any additional disciplinary action permits an agency to remove the employee. In this case, Grievant had a prior active Group III Written Notice. With the Group I Written Notice forming the basis of this appeal, the Agency has presented sufficient evidence to support Grievant's removal based upon the accumulation of disciplinary action.

Grievant denied that she hit the pipe with the golf cart. During the Agency's investigation, she told the Investigator that she thought she had hit a fire hydrant which was located approximately 75 feet from the pipe. The Agency has presented sufficient evidence to support the conclusion that Grievant drove a golf cart into the pipe. Grievant was the only person operating the golf cart at approximately 4:25 a.m. on October 5, 2010. Grievant admitted that she hit something at that time. This admission is consistent with the Agency's assertion that Grievant hit the pipe. If the Hearing Officer assumes for the sake of argument that Grievant did not hit the pipe but rather hit a fire hydrant, the outcome of this case remains the same. Grievant's operation of the golf cart resulted in damage to the golf cart. The damage was minor but plainly visible from the red paint that appeared on the golf cart. Grievant was obligated to report the accident even if the accident involved hitting a fire hydrant.

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

<sup>3</sup> See, Attachment A, DHRM Policy 1.60.

Grievant argued that she did not receive notice of the Facility's policy requiring her to report damage to the golf cart. The evidence showed that as a new employee Grievant should have received a copy of the Facility's policy requiring her to report accidents involving the golf cart. The Facility's policy was available to Grievant on the Agency's Intranet. The evidence is sufficient for the Hearing Officer to conclude that Grievant knew or should have known of the Facility policy and her obligation to report golf cart accidents.

Grievant argued that the golf cart did not have operating lights and that the Agency knew the golf cart was not safe. This argument is irrelevant. Grievant was not disciplined for failing to properly operate the golf cart. Grievant was disciplined for failing to report an accident involving a golf cart regardless of whether that golf cart could be operated safely.

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...."<sup>4</sup> 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 I Written Notice of disciplinary action is **upheld**. Grievant's removal based upon the accumulation 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:

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<sup>4</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>5</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 9498-R**

Reconsideration Decision Issued: February 10, 2011

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material; and
- (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant attached several documents to her request for reconsideration. None of the documents appear to have been discovered since the date of the hearing decision. Grievant has not suggested that she exercised due diligence with respect to the production of the documents. None of the documents are likely to produce a new outcome if the case is retried.

Grievant restates the arguments that she raised during the hearing. Grievant argues that if the golf cart had been safe, no damage would have occurred. This assertion is speculative. The fact remains that the Grievant was operating a golf cart

and drove it into an object causing damage to the golf cart. When she caused damage to the golf cart, she was obligated to report that damage in accordance with the Agency's policies.

Grievant argues that she did not know at the time of the collision that she had damaged the golf cart. This argument is untenable. The collision was sufficient to remove a metal box attached to a metal pole and leave a 5 inch scrape of red paint on the golf cart. Grievant knew or should have known that she had hit something at the time of the collision. Once she knew she had hit something, she should have examined the damage to the golf cart and reported that immediately in accordance with the Agency's policy.

Grievant argues that she did not have actual knowledge of the terms of the Agency's policy. It is not necessary for the Agency to show that an employee has knowledge of the details of a specific policy in order to uphold disciplinary action for failing to comply with that policy. It is sufficient if the Agency shows that an employee should have known of the policy. In this case, the Agency has established that Grievant should have known the details of the policy governing golf cart use. The policy was given to new employees and made available over the Agency's intranet.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

## **APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer



March 9, 2011

RE: **Grievance of [Grievant] v. Department of Behavioral Health and Developmental Services**  
Case No. 9498

Dear [Grievant]:

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In your appeal, you did not identify any such policy. Rather, it appears that you are contesting the hearing officer's assessment of the evidence and the conclusion he drew as a result of that assessment. Therefore, we must respectfully decline to honor your request.

Sincerely,

Ernest G. Spratley