

Issue: Group I Written Notice (parking in unauthorized area); Hearing Date: 06/21/11;
Decision Issued: 06/22/11; Agency: DVS; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9594; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9594

Hearing Date: June 21, 2011

Decision Issued: June 22, 2011

PROCEDURAL HISTORY

On January 18, 2011, Grievant was issued a Group I Written Notice of disciplinary action for parking in an unauthorized area.

On February 22, 2011, 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 May 18, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 21, 2011, 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 Department of Veterans Services employs Grievant in the Accounts Payable unit at the Facility. She has been employed by the Commonwealth of Virginia for approximately 22 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Facility has over a hundred parking spaces with a specific number reserved for visitors. In front of each reserved parking space is a metal post with a sign reading "VISITOR PARKING ONLY."

Grievant parked in a parking space reserved for visitors. The Director of Buildings and Grounds observed her parking in the space and spoke with her. He reminded her that the space was reserved for visitors and that employees should not park in visitor parking. He told Grievant she could park in the gravel lot, the access road, or the main entrance road if other spaces were not available. Grievant informed him that she would not park in a visitor's parking space again.

On August 26, 2010, the Administrator sent all staff, including Grievant, a memorandum stating, in part:

We are trying to keep spaces open for volunteers, visitors, and doctors, so we need some staff to park on the ... Access Road (on the pavement) if possible, or if there is no space available, park along the entrance road (on the grass).¹

¹ Agency Exhibit 6.

On January 13, 2011, Grievant was late to work and wanted to find a parking spot so she could enter the building and “clock in”. At least 25 nurses were visiting the Facility using visitor and other parking spaces. Construction work was taking place at the Facility resulting in at least two construction trucks in one of the parking areas making driving through that area difficult. Grievant drove around the parking areas nearest to the Facility but could not find an available space. She decided to park in a visitor’s parking space. The Director of Buildings and Grounds observed Grievant’s vehicle in a visitor’s parking space and notified Grievant’s supervisor of Grievant’s action.

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.”

Under the Facility’s Standards of Conduct, Group I offenses include, “[p]arking in unauthorized areas.” On January 13, 2011, Grievant parked in an area for which she was not authorized to park. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

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....”³ 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 contends the disciplinary action should be mitigated because she was unable to find a parking space in which she was authorized to park. The evidence showed that there were parking spaces available to Grievant. She could have parked

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

³ *Va. Code § 2.2-3005.*

along the access road or entrance road even though she would have had to walk a longer distance to work than from other authorized parking spaces.

If the Hearing Officer assumes for the sake of argument, that Grievant did not have other available parking spaces and that the absence of such parking spaces was a mitigating circumstance, there existed an aggravating circumstance to counter the mitigating circumstance. By parking in a visitor's parking space, Grievant reduced the number of available visitor's parking spaces thereby increasing the risk that a visitor would come to the Facility and be unable to find a parking space. The Agency decided that to the extent hardship existed with respect to finding a parking space that hardship should fall on employees and not on visitors.

Grievant argued that she was singled out for disciplinary action. She presented photos of other employees parking in visitor's parking spaces. Grievant's argument fails. In order to show the inconsistent application of disciplinary action, Grievant must show that Agency managers were aware that other employees were parking in visitor's parking spaces and failed to act. No credible evidence was presented to show that Agency managers were aware that other employees were parking in visitor's parking spaces. The Director of Buildings and Grounds testified that if he observed employees parking in visitor's parking spaces, he asked those employees to move their vehicles just as he had done when he first observed that Grievant had inappropriately parked her vehicle.

In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.⁴

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

⁴ Grievant also argued that she was retaliated against after filing a grievance to challenge the disciplinary action. Insufficient evidence was presented to support her assertion.

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.