

Issue: Group II Written Notice with Suspension (violation of safety rule); Hearing Date: 07/14/11; Decision Issued: 07/20/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9609; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9609

Hearing Date: July 14, 2011
Decision Issued: July 20, 2011

PROCEDURAL HISTORY

On February 3, 2011, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for violating a safety rule where there is a threat of bodily harm.

On February 16, 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 he requested a hearing. On June 6, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer extended the time frame for issuing a decision in this case due to the unavailability of a party. On July 14, 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 Corrections employs Grievant as an Electrician Supervisor at one of its Facilities. The purpose of this position is:

Performing journey repair, demolition, and maintenance work in trade/utilities area to performing advanced skilled repair and maintenance tasks in one or more specialized trades or utilities areas and general repair and maintenance tasks in other trade/utilities areas, while leading a crew of other skilled and semi-skilled trades workers or inmate crews.¹

The Agency was in the process of demolishing a Facility that it had closed approximately two or three years earlier. Grievant and Mr. J were responsible for supervising two crews of inmates. A Facility had obtained bulb crushers to enable the recycling of fluorescent light tubes containing mercury. Mercury is widely recognized as a poison and as a hazardous material. The bulb crushers removed the mercury from the fluorescent tubes so that it could be disposed of appropriately. Grievant had used the bulb crusher at the Facility.

The Facility had several buildings with tall ceilings containing light fixtures. Inside each light fixture were one or more florescent light tubes several feet long. The tubes

¹ Agency Exhibit 4.

were marked with the letters “Hg” which is the symbol for mercury as listed in the periodic table taught in secondary schools. There were approximately 160 lights in each building.

Grievant authorized the inmate work crews to remove the light fixtures from the ceilings using the simplest method. For several of the ceiling fixtures, the inmate crews removed the fixtures by causing them to fall from the ceiling to the floor. This caused the florescent lights to break and the mercury inside of them to spread. On November 2, 2010, the Institutional Safety Specialist visited the Facility and walked through the buildings being demolished. He observed shattered fluorescent lights grouped in a pattern consistent with fixtures having been dropped from the ceiling to the floor. He knew that the lights had mercury inside them and verified the symbol “Hg” appeared on several pieces of broken glass from the lights. He instructed Grievant and Mr. J to leave the buildings until such time as the Agency could determine how to clean up the mercury. One of the buildings was subsequently cleaned contrary to the Institution Safety Specialist’s instruction. Debris from that building was taken to a local landfill. The Agency informed administrators at the landfill that it may have received mercury from the Agency.

The Agency estimated that between 100 and 150 of the 300 light bulbs in two buildings had been destroyed. The Agency later determined that the buildings were contaminated by the mercury. Because of the mercury levels detected in the buildings, the Agency had to employ a private contractor to decontaminate the site. The Agency paid a contractor approximately \$91,000.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”² Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”³ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁴

“Violating safety rules where there is a threat of physical harm” is a Group III offense. Facility Operating Procedure 261C provides, “policy and procedures to ensure the safety of all individuals associated with [Facility] to maintain institutional compliance with the applicable Federal, State, and Local Regulations.” The policy requires that

² Virginia Department of Corrections Operating Procedure 135.1(X)(A).

³ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

every "Individual ... is responsible for acting in a manner that will protect the safety of all persons at the facility. *** employees are responsible for knowing and enforcing the safety rules in the area in which they are assigned." Regarding hazardous waste minimization, the policy provides:

Recycling should be the method of choice whenever possible in dealing with byproducts. Materials should be investigated for recycling opportunities either at the facility or at an off-site location.

Mercury can be poisonous to humans.

Grievant knew or should have known that he could have recycled the florescent light tubes using the Facility's bulb crusher. On October 18, 2010, Grievant received in-service training regarding the Facility Operating Procedure 261C which establishes recycling "as the method of choice whenever possible". Instead of requiring the inmates to remove the florescent lights and recycle them, Grievant permitted the inmates to remove the light fixtures by cutting them from the ceiling. By causing mercury to be disbursed throughout the buildings, Grievant exposed himself and others to physical harm. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for violating a safety rule where there is a threat of physical harm. In this case, the Agency issued a Group II Written Notice of disciplinary action. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to 10 workdays. Accordingly, the Agency's suspension of Grievant for three workdays is upheld.

Grievant argued that he did not know that the fluorescent lights contain mercury. He points out that the OSHA training he received did not mention that mercury is contained in fluorescent lights. The Agency argued that it was unnecessary for OSHA or the Agency to train Grievant that fluorescent lights contain mercury because that information was "common knowledge" among individuals with Grievant's skills. If the Hearing Officer assumes for the sake of argument that Grievant did not know and should not have known that florescent lights contain mercury, the outcome of this case does not change. Permitting light fixtures to fall from the ceiling onto a floor caused glass to shatter which could have endangered individuals working in the building when the fixture fell or afterward when walking throughout the building. At a minimum, the Agency has established unsatisfactory job performance which is a Group I offense. Because of the impact on the Agency, namely that it had to spend \$91,000 to clean the worksite, the Agency has established a basis to elevate the disciplinary action to a Group II Written Notice.⁵

Grievant argued that letting the light fixtures fall to the ground was less dangerous than requiring inmates to climb tall ladders to reach light bulbs. No sworn testimony was presented to support this assertion.

⁵ See, Attachment A, DHRM Policy 1.60 which establishes a basis to elevate a Group I to a Group II offense under certain circumstances.

Grievant argued that he was not at the Facility when the light bulbs were broken. He contends he was on vacation in September 2010 when the damage occurred. Grievant's argument is not supported by the evidence. The Institutional Safety Specialist visited the work site on a weekly basis with only a few exceptions. The broken light bulbs were discovered by the Institutional Safety Specialist on November 2, 2010. He had not observed broken light bulbs during any of his weekly visits prior to that date. It is not likely that the light bulbs were broken in September 2010 when Grievant was on vacation. It is more likely that the light bulbs were broken when Grievant was working at the Facility.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.⁷

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **upheld**.

APPEAL RIGHTS

⁶ *Va. Code § 2.2-3005.*

⁷ It is clear that Grievant could have received better supervision from the Demolitions Manager, Mr. S. Although the Demolitions Manager received a memorandum in April 2009 from the Institution Safety Specialists reminding him that there were many compact fluorescent light bulbs in the buildings and that they could not be discarded as household trash because they contain mercury, the Demolitions Manager did not take the effort to inform Grievant of the Institutional Safety Specialist's comments. The Agency took disciplinary action against the Demolitions Manager. The inaction of the Demolitions Manager is not a mitigating circumstance in this case because Grievant received in-service training regarding the Facility's policy regarding recycling to minimize hazardous waste.

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].

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

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer