

Issue: Group III Written Notice with demotion and pay reduction; Hearing Date: 11/01/11; Decision Issued: 11/04/11; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9695; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9695

Hearing Date: November 1, 2011
Decision Issued: November 4, 2011

PROCEDURAL HISTORY

On June 30, 2011, Grievant was issued a Group III Written Notice of disciplinary action for lying to a supervisor and failing to secure Agency files. Grievant was demoted to a lower Pay Band with a 39.4% disciplinary pay reduction effective July 1, 2011.

On July 28, 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 October 4, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 1, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
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:

Virginia Commonwealth University employed Grievant as a Police Officer in its Police Department. He had been employed by the Agency for four years prior to his demotion to a Security Officer effective July 1, 2011. The purpose of Grievant's position was:

Provide comprehensive police services; patrol by foot, bike and car; inspect facilities; investigate complaints, alarms and crimes in progress; generate field contacts, arrests, and reports; provide community policing and customer service; handle special assignments, investigations, overtime, uniformed, traffic, plainclothes, court, administrative and investigative assignments.¹

The Company sold Grievant a vehicle and retained a lien on the vehicle. Grievant experienced financial difficulties and was unable to pay the lien. The Female Owner of the Company went to Grievant's residence to repossess the vehicle. The Female Owner noticed police equipment inside Grievant's vehicle and chose not to repossess the vehicle.

On April 8, 2011, the Company's Female Owner called the Supervisor and told the Supervisor that the Company was trying to take possession of the vehicle owned by Grievant. The Female Owner stated that there was police equipment inside the vehicle and she did not believe it was appropriate to take the vehicle without contacting the

¹ Agency Exhibit 4.

Police Department. The Sergeant called Grievant and informed Grievant of the telephone call. Grievant told the Sergeant that he no longer was in possession of the vehicle and that it had been surrendered as part of a bankruptcy agreement. The Sergeant considered the matter closed.

On May 12, 2011, Grievant drove his personal the vehicle into the Agency's parking deck. He left Agency documents inside the vehicle. He left the car unlocked and went to work.

On May 12, 2011, the Female Owner called the Police Department and spoke with the Lieutenant. She indicated that the Company was attempting to repossess Grievant's personal vehicle. The Lieutenant called the Supervisor and Sergeant H into a meeting. Grievant was located on another campus. They called Grievant using a speaker phone. The Lieutenant asked Grievant about the location of the vehicle. Initially, Grievant told the Lieutenant that the vehicle was at his residence. The Lieutenant asked if there was police equipment inside the vehicle. Grievant responded yes. The Lieutenant asked Grievant if he could arrange to remove equipment from the vehicle so that the Company could get the vehicle that evening. Grievant stated that the vehicle was not at his residence. Grievant stated that his cousin had the vehicle. The Lieutenant asked what could be done to resolve the issue. Grievant explained that his cousin had the vehicle but was bringing it to the parking deck. The Lieutenant began to doubt Grievant's story. The Lieutenant asked Grievant if he had driven the vehicle to work that day. Grievant said he had not driven the vehicle to work but that he had driven a different vehicle to work that day. The Lieutenant asked why Grievant drove one car and the cousin brought another car. Grievant responded that his cousin brought the other car to switch out with Grievant's personal vehicle so that Grievant's personal vehicle could be serviced. The Lieutenant asked if they could make arrangements to remove the police equipment from the vehicle located in the parking deck. Grievant said yes and that the Company could come and get the vehicle.

The Lieutenant sent Sergeant H to the parking deck to see if there was police equipment inside the vehicle. Sergeant H located the vehicle in the parking deck and observed police reports, criminal histories, and summonses in plain sight. These documents contained confidential information such as Social Security numbers of individuals involved in arrests. Sergeant H noticed that the vehicle was unlocked so he removed the documents and took them to the Lieutenant.

The Lieutenant called Grievant to let them know that Sergeant H had located Grievant's personal vehicle in the parking deck and had removed items from the vehicle. The Lieutenant asked if he could call the Company and tell the Company to get the vehicle. Grievant said okay.

The Lieutenant called the Company and spoke to the Male Owner. He told the Male Owner that he could go to the parking deck and pick up the vehicle or that Grievant would drive the vehicle to the Company's location the following morning. The Male Owner asked that Grievant deliver the vehicle. Grievant delivered the vehicle to the Company on the following morning.

The Lieutenant spoke with Grievant about the incident and told Grievant that he thought Grievant was being untruthful. The Lieutenant asked Grievant to confirm whether his prior statements about the location of the vehicle were correct. Grievant reiterated that his prior statements were correct.

The Lieutenant reviewed a video of the entrance to the parking deck. The video showed the Grievant entered the parking deck at 4:02 p.m. on May 12, 2011. On May 17, 2011, the Lieutenant and Sergeant H discussed the video with Grievant. When confronted with information about the video, Grievant admitted that he had intentionally deceived the Lieutenant. Grievant stated that he had panicked when questioned and fabricated the story.

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.”

DHRM Policy 1.60 lists numerous examples of offenses. These examples “are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.”

Under the Agency's Standards of Conduct, Section 545 governs employee integrity and states:

Department employees must scrupulously avoid any conduct which might compromise their personal integrity, that of fellow employees, or the department, and shall not condone such activities of another. Members should speak and write the truth at all times and in cases where they are not allowed to divulge the facts by department policy, they will say nothing. Members shall not make false statements, falsify any written or verbal report made to a superior officer, or willfully or intentionally withhold material matter from such report or statement.³

The Agency's Standards of Conduct does not specify what level of disciplinary action is appropriate for an employee who acts contrary to Section 545. In the Agency's

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

³ Agency Exhibit 6.

judgment, a Police Officer who lies to a supervisor has committed a Group III offense. That judgment is consistent with Attachment A, DHRM Policy 1.60 which makes falsification of records a Group III offense. The Hearing Officer construes Attachment A to justify issuance of a Group III Written Notice for untruthfulness.

The Agency has presented sufficient evidence to show the Grievant was untruthful to the Supervisor and to the Lieutenant thereby justifying the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. In lieu of removal, an agency may demote an employee to a lower Pay Band with a disciplinary pay reduction. In this case, Grievant was demoted from a Police Officer to a Security Officer. He received a 39.4% disciplinary pay reduction effective July 1, 2011. Grievant's demotion and disciplinary pay reduction must be upheld.

Grievant argued that the questions presented to him were inappropriate because the Agency was interfering in a personal matter. Grievant's argument fails. The Agency received a complaint from individuals who knew the Grievant was affiliated with the Agency's Police Department. Grievant's vehicle contained Agency property. It was appropriate for the Agency to respond to the complaint and to address what action to take with respect to its property located in Grievant's vehicle.

The Agency also presented evidence that Grievant acted contrary to Section 523 of the Agency's Standards of Conduct governing confidentiality. The section provides:

Safeguarding information about an individual or group that has been obtained by a law enforcement officer pursuant to his duty or an official investigation is a primary obligation of all police employees. Such information is not to be communicated to others unless certain important conditions are met. No information shall be maintained or transmitted to another about the private life of any individual, which does not relate specifically to the violation of laws. Security and privacy of information shall be assured to all individuals whose records are maintained by the department. Such records shall be used only for official law-enforcement purposes. Information on individual shall not be processed or integrated into other record systems except to inform criminal justice agencies on matters pertaining to violations of law. Only those with a legitimate right shall have access to any criminal justice agency records or records system. Specifically, information contained in police records, other information ordinarily accessible only to employees and names of informants, complainants, witnesses, and other persons known to the police to include information received from NCIC/VCIN are considered confidential. Violation of security of this type of information reflects gross misconduct.⁴

Grievant failed to safeguard police records containing confidential information such as the Social Security numbers of individuals involved in criminal matters. The

⁴ Agency Exhibit 6.

Agency's Standards of Conduct is silent regarding the appropriate level of disciplinary action when an employee fails to safeguard police records. Failure to follow policy is a Group II offense under the DHRM Policy 1.60. Grievant acted contrary to the Agency's policy thereby engaging in a Group II offense. The Agency did not present sufficient evidence regarding the impact of Grievant's behavior on the Agency to elevate the Group II offense to a Group III offense. Because they Agency has presented sufficient evidence to support the issuance of a Group III Written Notice based on Grievant's untruthfulness, Grievant's failure to secure police records does not change the outcome of this case.

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...."⁵ 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 III Written Notice of disciplinary action with demotion and disciplinary pay reduction 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:

⁵ Va. Code § 2.2-3005.

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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.