

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 11/10/11;
Decision Issued: 11/14/11; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9696; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9696

Hearing Date: November 10, 2011
Decision Issued: November 14, 2011

PROCEDURAL HISTORY

On April 1, 2011, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On April 25, 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 October 19, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 10, 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?
5. Whether the Agency discriminated or retaliated against Grievant?

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 Bridge Tunnel Patroller at one of its Facilities. The purpose of her position is:

Wide variety of tasks associated with directing and controlling traffic. This position is designated as essential and, as such, all duties associated with this job are required during emergency situations which may include but are not limited to inclement weather, disaster response and emergency operations. VDOT will determine when essential positions are required.¹

Grievant has been employed by the Agency for approximately 9 years. She received an overall rating of Contributor on her 2009 performance evaluation. No evidence of prior active disciplinary action was introduced during the hearing.

One of Grievant's Core Responsibilities is to "[a]ccurately and safely monitors/inspects vehicles in compliance with applicable regulations."² Grievant often worked in a patrol booth located where recreational vehicles stopped for inspection. Many recreational vehicles have liquid petroleum tanks that can create a hazard inside

¹ Agency Exhibit 8.

² Agency Exhibit 8.

a tunnel if the tank is not closed. When a recreational vehicle stops, Grievant is expected to leave the booth and ask the driver if the liquid petroleum tank is closed. Grievant is then expected to ask the driver to demonstrate that the liquid petroleum tank is closed.

On August 2, 2010, Grievant was assigned to work as a Bridge Tunnel Patroller on the 6 a.m. to 2 p.m. shift at the Facility. At approximately 11:45 a.m., the Traffic Control Supervisor, Mr. K, used the Facility's closed-circuit television monitor to observe Grievant working in the booth. Two recreational vehicles pulled into the inspection lane next to Grievant's booth. Grievant did not exit the booth and did not inspect the two vehicles. While standing in the front door of the booth, Grievant extended her arm and motioned the drivers to proceed through the tunnel. Approximately 10 minutes later another recreational vehicle pulled into the inspection station. Grievant did not come outside of the booth to inspect the vehicle.

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."³ 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."

"[U]nsatisfactory work performance" is a Group I offense.⁴ 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 August 25, 2009, the Manager sent a memorandum to all Tunnel Operations Employees regarding Tunnel Facilities Regulations. The memorandum contained a paragraph addressing Liquid Petroleum Gas stating:

All campers or Recreational Vehicles (RVs) or other vehicles transporting LP gas containers entering the inspection stations/or stop at our Patrol Booths will be checked to ensure that the gas bottles are turned off. The driver of the vehicle will be required to physically show our Inspection Station/Patrol Booth employees that the LP gas is turned off. By no means will our employees turn off the LP gas for the driver/operator of the vehicle.

³ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁴ See Attachment A, DHRM Policy 1.60.

On August 7, 2010, three Recreational Vehicles entered the inspection station where Grievant was working. Grievant did not exit the Patrol Booth to ensure that the LP gas bottles were turned off. Grievant did not ask the drivers of those vehicles to show her that the LP gas was turned off. Grievant's work performance was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

Grievant argued that employees routinely failed to follow the requirements of the memorandum because not all recreational vehicles were inspected. She argued that when the Agency's managers began requiring that all recreational vehicles be inspected, a backup and accident occurred on the highway. She argued that Agency managers quickly reversed their practice.

The evidence showed that on some occasions, drivers of recreational vehicles did not stop at the inspection stations and, thus, were not inspected. When the Agency attempted to have every vehicle stop instead of driving past an inspection station, an accident occurred that caused Agency managers to change the practice requiring every recreational vehicle to stop. The facts of Grievant's case involve circumstances where three recreational vehicles stopped at the inspection station where Grievant was working. No credible evidence was presented to show that employees routinely failed to inspect recreational vehicles that stopped at inspection stations. The memorandum addressed recreational vehicles stopping at inspection stations, not recreational vehicles bypassing inspection stations. Agency managers did not reverse the terms of the August 25, 2009 memorandum.

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.

Grievant alleged that Mr. K's accusations were false and were based on sexual discrimination and harassment against Grievant due to her rejections of his sexual advancements over time. Grievant argued that Mr. K had the camera focused on her in order to harass her. Neither Mr. K, nor Grievant testified at the hearing. Grievant did

⁵ *Va. Code § 2.2-3005.*

not present any witnesses who observed how Mr. K operated the camera on August 7, 2010. Grievant did not present any evidence regarding Mr. K's motivation. The Agency's Civil Rights unit investigated Grievant's claims about Mr. K and concluded that they were unfounded. There is no basis for the Hearing Officer to conclude that Mr. K or the Agency took action against Grievant as a form of discrimination, harassment, or 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.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.