

Issue: Group II Written Notice with Suspension (failure to follow instructions); Hearing Date: 12/19/11; Decision Issued: 12/22/11; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9725; Outcome: Full Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9725

Hearing Date: December 19, 2011
Decision Issued: December 22, 2011

PROCEDURAL HISTORY

On September 12, 2011, Grievant was issued a Group II Written Notice of disciplinary action with a three workday suspension for failure to follow a supervisor's instructions.

On September 21, 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 December 5, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 19, 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 Virginia Department of Transportation employs Grievant as a Transportation Operator II at one of its Facilities. He has been employed by the Agency for approximately 21 years. The purpose of his position is:

Performs a combination of skilled equipment operation, preventive maintenance, and manual labor. Equipment operation includes but is not limited to backhoes, dump trucks, tractors, and similar equipment. Perform emergency roadway operations as an essential employee; must be willing to work outside of normal work hours during emergency conditions. Perform the necessary maintenance operations to improve the safety, operations, and upkeep of Virginia's integrated surface transportation system.¹

No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The Agency had an employee list showing their home and mobile telephone numbers. Grievant had provided the Agency with his home telephone number. Grievant had a personal mobile telephone. When he was working away from the Agency's office, he sometimes called other employees using his mobile telephone.

¹ Agency Exhibit 6.

Agency employees would sometimes call Grievant's mobile telephone. Grievant's mobile telephone number was handwritten on the Agency's contact list by the Acting Superintendent, Ms. M. She obtained the mobile telephone number from Grievant or another employee. Grievant's practice was to use his mobile telephone while he was at work or away from his home. When he entered his home, he usually placed his mobile telephone in a basket and did not retrieve it until he left his home.

On August 24, 2011 at approximately 1:30 p.m., the Supervisor informed Grievant and other staff that he had received an email from the Assistant District Administrator stating that the Agency had gone to an "All Hands on Deck" mode of operation in response to an approaching hurricane. On August 25 at 3:27 p.m., the Residency Administrator sent an email to several Agency supervisors stating, in part:

Please anticipate being directed to report to duty on Saturday morning, 8/27/11, to assigned locations. The exact report time should be determined tomorrow, Friday afternoon, as the predicted hurricane probability and confidence increases.

All personnel must prepare and adhere to the following:

1. Bring your own food, clothes (extra socks, etc.), sleeping bag, and any other personal items necessary to be prepared to stay at your assigned duty locations (AHQ or Residency as assigned) overnight, Saturday night.
2. Once reporting to duty, all personnel must travel in pairs at a minimum in all cases.²

Mr. C provided Grievant with a copy of the Residency Administrator's email. Grievant later packed his clothes in a bag in anticipation of having to work on August 27, 2011.

On August 26, 2011, the Supervisor called Grievant's mobile telephone at approximately 12:33 p.m. and left a message that Grievant was to report to work at 10 a.m. on Saturday, August 27, 2011.

On August 26, 2011 at approximately 4 p.m., Grievant and his spouse went to a local grocery store. Grievant did not take his mobile telephone with him when he left his house to go to the grocery store because the grocery store was not located far from his home. Another Agency employee, Mr. A, was also at the grocery store. Grievant asked Mr. A if he had heard anything about coming in for storm duty. Mr. A said that he had been called to let him know when to report to work. Grievant said that he had not heard anything yet and "maybe it was because I have been on light-duty and they don't need me."

² Agency Exhibit 4.

Grievant did not report to work at 10 a.m. on August 27, 2011. At 10:48 a.m. the Acting Superintendent called Grievant's mobile telephone number and left another message advising him that he was supposed to report to work at 10 a.m. The message was marked "urgent." At 1:15 p.m. the Acting Superintending called Grievant's home telephone number and left a message on his answering machine telling Grievant to contact the office as soon as possible. At 1:50 p.m., Grievant returned the call and stated that he was on his way into the office and that he had not received any messages telling him to report to work. At 2:30 p.m. Grievant reported to work and stated that he did not check his mobile telephone messages and he only received a message on his home telephone.

During the Second Step meeting, the Residency Administrator asked Grievant if he had provided his mobile telephone number to a supervisor and indicated that he could be called on that mobile telephone. Grievant responded by stating, "Yes, I told them that they can call me if they need anything. I don't mind." The Residency Administrator asked Grievant if he had ever told a supervisor or superintendents not to call his mobile telephone number after business hours. Grievant replied "No, I told them that they can call my cell phone anytime they need me."

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 26, 2011, Grievant spoke with Mr. A and learned that Mr. A had been advised by the Agency to report to work on August 27, 2011. Grievant knew that the Supervisor previously had contacted Grievant on Grievant's mobile telephone. Grievant expected to be called by the Supervisor. Grievant should have known to either check his mobile telephone number to determine whether the Supervisor had called him or call the Agency to verify that his attendance was no longer necessary for August 27, 2011. Grievant's failure to do so was unsatisfactory work performance. The Agency has

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.

presented sufficient evidence to support the issuance of a Group I Written Notice of disciplinary action. An agency may not suspend an employee who has received only a Group I Written Notice.

The Agency contends that Grievant failed to follow supervisor's instructions, a Group II offense. In order to establish the Grievant failed to comply with a supervisor's instructions, the Agency may show the Grievant knew of the supervisor's instruction and chose to disregard that instruction. The Agency has not established that Grievant failed to follow a supervisor's instruction. The instruction given to Grievant involved two parts. First, Grievant was instructed to report to work on August 27, 2011. Second, he was instructed that the time to report would be determined on August 26, 2011 and that he would be notified of that time. Grievant received the instruction to report to work on Saturday, August 27, 2011. He did not receive the instruction regarding what time to report to work. When Grievant was contacted later in the day on August 27, 2011 on his home telephone number, he responded to the instruction and went to work. The Hearing Officer has no reason to believe that Grievant would have disregarded the Supervisor's instruction to report at 10 a.m. had that instruction been left on his home telephone answering machine. Grievant's failure to report in the morning of August 27, 2011 was not because he intended to disregard a supervisor's instruction but rather was because he failed to check messages left on his mobile telephone number. Grievant did not demonstrate the necessary intent to be disciplined at the level of a Group II offense for failing to comply with a supervisor's instruction.

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 further the disciplinary action.

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 **reduced** to a Group I Written Notice of disciplinary action. The Agency is directed to provide the Grievant with **back**

⁵ Va. Code § 2.2-3005.

pay less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

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

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

[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