

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 02/28/12;  
Decision Issued: 03/06/12; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 9766; Outcome: Full Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9766**

Hearing Date: February 28, 2012  
Decision Issued: March 6, 2012

**PROCEDURAL HISTORY**

On February 23, 2011, Grievant was issued a Group I Written Notice of disciplinary action for failing to take steps to correct the behavior of a subordinate manager.

On March 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 he requested a hearing. On February 1, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 28, 2012, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant Counsel  
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 Residency Maintenance Program Manager at one of its Facilities. He has been employed by the Agency for approximately 27 years without having received any disciplinary action.

In the spring of 2010, the Agency was implementing a reorganization of Agency functions and staff. Several residencies began operating without Fiscal Technicians who otherwise would have provided many administrative functions. Many residencies experienced a significant reduction in staff. The Agency's "Blueprint" became effective April 24, 2010.

In April 2010, Mr. P was a Residency Administrator working for the Agency. Mr. W had been the maintenance supervisor at the Residency for several years. On April 1, 2010, Mr. P made Mr. W the Acting Superintendent of the Residency. Mr. W was assigned a four-wheel drive pickup truck. As Acting Superintendent, Mr. W supervised approximately 8 employees. Because of the Agency's reorganization, he did not have a Fiscal Assistant or foreman working at the Residency. Instead of sending all of his crew members into the field to perform job assignments, Mr. W had to keep some of his crew in the office to perform timekeeping and fiscal work. He assigned responsibility for repairing equipment to a crew member who was especially capable as a mechanic.

Grievant became Acting Residency Administrator under the Agency's Blueprint. Instead of overseeing two counties, Grievant became responsible for four counties. On

April 27, 2010, Grievant began supervising Mr. K and Mr. W. Mr. K was the Acting Assistant to Grievant and was assigned responsibility to supervise Mr. W. Mr. K had concerns about how Mr. W was managing the Residency. He believed that Mr. W was showing favoritism to certain employees with respect to the assignment of tasks. He was concerned that Mr. W was having too many employees remain at the Residency performing administrative tasks and other duties instead of sending a sufficient number of employees to perform jobs at various worksites. Mr. K believed that Mr. W was creating an unsafe work environment for employees working at jobsites away from the Residency office.<sup>1</sup>

Mr. W was in Grievant's chain of command from April 27, 2010 until July 15, 2010. During that period of time, Grievant met with Mr. W at least three times and asked him "how things were going". Mr. W said he was overwhelmed and "was drowning" because of the staff shortages. Grievant helped Mr. W learn how to operation his residency within its budget. Grievant helped Mr. W obtain access to several Agency computer systems necessary to perform his duties.

On April 27, 2010, Mr. W was meeting with his subordinates as part of a safety meeting. Mr. K joined the meeting and said that he wanted to speak to Mr. W after the meeting. Mr. K added that Mr. W had been showing favoritism to Mr. B, Mr. D, and Mr. A. Mr. K made his comments in front of Mr. W's subordinates. Mr. W perceived Mr. K's comments as an attempt to belittle him in front of his work crew. Mr. W was angered by Mr. K's comments and they argued. Mr. K stated that he had received telephone calls from crewmembers about favoritism by Mr. W. Mr. W told Mr. K that unless Mr. K was willing to tell Mr. W who was making the telephone calls, Mr. W did not want to hear about it. Mr. K questioned whether Mr. W could handle the job as Acting Superintendent and said that if Mr. W could not handle the job, Mr. K had someone in mind who could handle the job. Mr. K told the employees that his door was always open and that if they had a problem they could come and speak with Mr. K. Mr. K left the meeting. Approximately a week later, Mr. K sent Mr. W an email stating that Mr. K continued to receive telephone calls complaining of favoritism by Mr. W to Mr. B, Mr. D, and Mr. A.

On July 14, 2010, Mr. W assigned staff to travel routes and pick up filled trash bags along those routes. A citizen called Mr. W and complained that some of the trash bags had not been collected. Mr. W believed that Mr. H and Mr. A had failed to pick up the trash bags. Mr. A disputed this contention. On July 15, 2010, Mr. A asked Mr. W for Mr. K's telephone number. Mr. W refused to give Mr. A the telephone number and lost his temper when Mr. A continued to request the telephone number. Mr. W put his

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<sup>1</sup> The Compliance Manager testified that he received calls from employees beginning in May 2010 alleging safety violations at the Residency. The Compliance Manager would visit the Residency and speak with employees including Mr. W. The Compliance Manager concluded a safety violation occurred every time it was alleged. When he spoke with Mr. W, Mr. W was argumentative, disrespectful, disingenuous, and rude towards the Compliance Manager. The Compliance Manager testified that Mr. W's reaction to him was the exception when compared to the behavior of other Residency Superintendents who typically "bent over backwards" to resolve safety problems.

finger in Mr. A's face in an intimidating manner and said "You did not pick those damn bags up". Mr. W followed Mr. A out of the office and said "F—k you, and I will tell [Mr. K] the same thing."

On the afternoon of July 15, 2010, Grievant and Mr. K came to the Residency and interviewed all of the employees who overheard the conversation. The Agency argued that Grievant failed to interview all of the employees. That allegation was not substantiated by the evidence.

Effective July 15, 2010, Mr. W was no longer the Acting Superintendent of the Residency. The Agency filled the Superintendent position with another employee.

Grievant and Mr. K met with Human Resource staff regarding Mr. W's behavior on July 15, 2010. Mr. K stated that he wanted to terminate Mr. W for workplace violence. Based on his discussions with the Human Resource staff, Grievant concluded it would be appropriate to issue Mr. W a Notice of Improvement Needed/Substandard Performance. On July 20, 2010, Mr. K presented Mr. W with a Notice of Improvement Needed/Substandard Performance regarding Mr. W's outburst on July 15, 2010. Grievant signed the document as the Reviewer. Mr. W wrote that he admitted he lost his temper and that he "said the D word and the F word".

On July 23, 2010, Mr. W drafted a letter addressed "To Whom It May Concern". The letter was presented to Agency managers. Grievant received a copy of the letter shortly after July 23, 2010. In the letter, Mr. W alleged that Grievant and Mr. K had not supported him in his position and had an open bias towards him resulting in a hostile work environment. He alleged he was discriminated against and welcomed an Agency investigation. Grievant first learned that the Agency believed that Mr. K was not properly supervising Mr. W when he received a copy of the letter from the Agency.

## **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."<sup>2</sup> 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.<sup>3</sup> In order to prove unsatisfactory work performance, the Agency must establish that Grievant was

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<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See Attachment A, DHRM Policy 1.60.

responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

In order to establish that Grievant engaged in behavior giving rise to disciplinary action, the Agency must show that Mr. K engaged in inappropriate behavior and that Grievant knew of that behavior. Grievant is not responsible for inappropriate behavior by Mr. K unless Grievant was aware of that behavior and failed to address that behavior. The Agency has not met its burden of proof in this grievance.

The Agency presented evidence that on April 27, 2010, Mr. K interrupted a staff meeting conducted by Mr. W and then belittled Mr. W in front of his crew. The Agency contends that Mr. K's behavior served to undermine Mr. W's ability to supervise and that Grievant failed to take action to correct Mr. K's behavior. Insufficient evidence was presented to show that Grievant knew prior to the meeting that Mr. K would attempt to belittle Mr. W. Insufficient evidence was presented to show that Grievant was aware of Mr. K's behavior and ignored it. The evidence showed that on at least three occasions Grievant met with Mr. W and asked him how he was doing. Mr. W complained that he had too much work. Mr. W did not complain about Mr. K's supervision.

The Agency presented evidence that Mr. K accused Mr. W of selling drugs while working at the Residency. Mr. K had received complaints from employees at the Residency who claimed to have observed Mr. W doing so. Grievant reported to the Manager, Mr. B. Grievant was present when Mr. K informed the Manager of the allegations. Grievant took no actions to investigate the allegations because he believed his responsibility was to ensure that the Manager was aware of the problem. The Manager later took steps to investigate the allegations by asking the Compliance Manager to conduct an inspection at the Residency. The Agency contends the Grievant should have reported the matter to the State Police for investigation. The evidence showed that Grievant's behavior was appropriate because the matter had been reported to the Manager and the Manager decided how to respond. Grievant was not involved in the Manager's decision-making process.

The Agency presented evidence that Grievant acted with Mr. K to question whether Mr. W should have a four wheel drive pickup truck. This upset Mr. W because all of the Agency's residency superintendents were assigned four wheel drive pickup trucks. The evidence showed that Mr. W was able to retain his pickup truck and at the time Grievant was questioning whether Mr. W should have a pickup truck, the Agency had not finalized the reallocation of Agency transportation vehicles. There is no basis for disciplinary action against Grievant because of his conversation with Mr. W about the pickup truck.

The Agency argued that Grievant tolerated Mr. K's unnecessary and excessive focus on Mr. W. The Agency argued that Mr. K tried to portray Mr. W's performance as being unacceptable and that Grievant took no actions to stop Mr. K. The evidence showed, however, that some of Mr. K's concerns were legitimate. Mr. K was concerned that Mr. W was not operating the Residency in a safe manner. Each time the

Compliance Manager visited the Residency to investigate a complaint about safety, the Compliance Manager concluded that the complaint was valid. Mr. W cursed at Mr. A in July 2010. Mr. K wanted to terminate Mr. W. If Grievant had intended to undermine Mr. W or help Mr. K undermine Mr. W's work performance, Grievant could have supported Mr. W's removal. Instead, Grievant consulted with Human Resource staff and concluded the appropriate corrective action was a Notice of Improvement Needed/Substandard Performance.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>4</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>4</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.