

Issue: Group I Written Notice (unsatisfactory performance); Hearing Date: 02/29/12;
Decision Issued: 03/01/12; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case
No. 9770; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9770

Hearing Date: February 29, 2012
Decision Issued: March 1, 2012

PROCEDURAL HISTORY

On August 10, 2011, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance.

On September 5, 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 7, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 29, 2012, 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 an Equipment Repair Technician at one of its Facilities. He has been employed by the Agency for approximately eight years.

Grievant was responsible for performing preventive maintenance on several Agency vehicles. The Agency's practice was to give Grievant a work order listing the tasks Grievant was to perform to complete the preventive maintenance.

On July 13, 2011, Grievant performed preventive maintenance on an Agency Dump Truck. One of the tasks was to replace the vehicle's fuel filters. Grievant failed to replace the fuel filters. He told another employee that the job was completed and that the vehicle was ready for service. On the following day, another technician notified the Supervisor that the fuel filters had not been changed. The Supervisor examined the markings on fuel filters in the Dump Truck and concluded that the filters had not been changed. The new filters that were intended to be installed in the Dump Truck were found in the seat of Grievant's service truck.

Grievant was assigned responsibility to lubricate the chassis of an Agency pickup truck. Part of the task of lubricating the chassis involved greasing ten ball joints. Grievant greased eight ball joints but did not grease the top two ball joints. On July 22, 2011, a technician notified the Supervisor that the ball joints had not been greased. The Supervisor inspected the pickup truck and determined that it was obvious that the ball joints had not been greased.

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.”¹ 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.² 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.

Grievant was assigned the task of changing the fuel filters on a Dump Truck. He completed service on the Dump Truck but failed to change the fuel filters. Grievant was assigned responsibility to grease the ball joints of a pickup truck. He failed to grease two of the ball joints. Grievant’s work performance was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory performance.

Grievant argued that he simply forgot to perform the tasks and that his actions were not intentional. This argument fails. Grievant was presented with a preventive maintenance form listing the specific tasks he was to perform. It was not necessary for Grievant to remember the task to perform. He could read the tasks from the preventive maintenance document and mark off the task once he completed it. In addition, the Agency had counseled Grievant in the past about completing all of the tasks assigned to him as part of the preventive maintenance on a vehicle.

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....”³ 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-

¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See Attachment A, DHRM Policy 1.60.

³ *Va. Code § 2.2-3005.*

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. Grievant argued that he was going through a divorce and, thus, "had a lot on his mind". Although divorce proceedings may have influenced Grievant's behavior, it is not a mitigating factor in this case. No evidence was presented to show the nature and degree of Grievant's personal circumstances and whether those circumstances prevented him from performing his job properly. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Grievant argued that he was being punished twice because he had received another Written Notice at the same time. This argument fails. Although neither party presented that Written Notice as evidence, the Supervisor testified that the other written notice resulted from Grievant's excessive use of the internet during work hours. Grievant did not identify any State policy that would prevent the Agency from issuing him two written notices at the same time.

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.⁴

[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

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