

Issue: Group III Written Notice with Suspension (failure to follow instructions); Hearing Date: 04/25/12; Decision Issued: 05/03/12; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9774; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9774

Hearing Date: April 25, 2012
Decision Issued: May 3, 2012

PROCEDURAL HISTORY

On November 8, 2011, Grievant was issued a Group III Written Notice of disciplinary action with a 24 hour suspension for failure to follow a supervisor's instructions.

On December 12, 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 21, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame in this grievance due to the Grievant's unavailability. On April 25, 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 Department of Corrections employs Grievant as a Plumbing/Steamfitter Supervisor at one of its Facilities. The purpose of his position is:

Perform installation, preventive and corrective maintenance on all plumbing fixtures, domestic and heating water systems, steam lines and equipment and sewage lines throughout the institution.¹

He has been employed by the Agency for approximately one year without receiving any prior active disciplinary action.

On November 7, 2011, the main pipeline under the Greenhouse at the Facility clogged. Although the main line was located underground, a vertical pipe with a cap on it connected to the underground pipe. In order to unclog the underground pipe, one would have to take the cap off of the end of the vertical pipe, "snake" the main pipe by inserting a tool into the pipe, and replace the cap on the vertical pipe.

On November 7, 2011, the Supervisor instructed Grievant to place a trash bag over the relief pipe to catch the waste as he opened the cap on the pipe, then clear the

¹ Agency Exhibit 4.

clog in the pipe. In order to complete the job, Grievant was expected to clean up the sewage around the pipe.

Later in the day, Grievant told the Supervisor that he had gotten the pipe unclogged and cleaned out.

On November 8, 2011, several employees viewed the vertical pipe and observed that liquid was leaking from the sides of the cap and that sewage and toilet tissue remained on the ground surrounding the pipe. The toilet tissue and much of the sewage had not been cleaned up by Grievant on November 7, 2011.²

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”³ Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”⁴ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁵

The Agency contends Grievant failed to comply with a supervisor’s instructions thereby justifying the issuance of a Group II Written Notice. Because of the severity of the behavior, the Group II Written Notice should be elevated to a Group III offense. The Agency has only established a Group I offense which can be elevated to a Group II offense.

The Agency has established that Grievant engaged in behavior giving rise to disciplinary action because his work performance was inadequate. He was instructed to clean out a clogged pipe and clean up the sewage on the ground.⁶ He cleaned out the clog while using trash bag over the vertical pipe to catch sewage as instructed. He intended to clean up the sewage on the ground but did not do so because he could not

² For example, the toilet tissue could not have passed through the cap placed on the pipe. The cap had been on the pipe the entire day of November 8, 2011 and, thus, the tissue must have landed on the ground prior to November 8, 2011 and been present on November 7, 2011 when Grievant worked on the pipe.

³ Virginia Department of Corrections Operating Procedure 135.1(X)(A).

⁴ Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

⁵ Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

⁶ Grievant complied with the Supervisor’s instruction to unclog the pipe. Simply because the pipe became clogged again on November 8, 2011 does not mean that Grievant failed to comply with the Supervisor’s November 7, 2011 instruction to unclog the pipe.

find lime to spread on the ground. Lime was available to him if he had made a greater effort to find the lime.⁷ He was not specifically instructed to use lime as part of his clean up but the Supervisor expected Grievant to use lime to complete the clean up process. Grievant's behavior rises to the level of a Group I offense for inadequate or unsatisfactory job performance.

A basis exists to elevate the disciplinary action from a Group I to a Group II offense.⁸ The Agency presented evidence showing that leaving sewage on the ground created a significant environmental hazard. The Facility serves as a water treatment and distribution facility supplying water to other correctional facilities and nearby towns. Leaving sewage on the ground could have contaminated the water table below the ground according to the Environmental Specialist II. Leaving sewage on the ground violated numerous local, state and federal regulations according to the Environmental Specialist II. Particles from the sewage created the risk of water contamination to the facility and those receiving water from the water treatment plant at the facility. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, Grievant's 24 hour suspension must be upheld.

Grievant argued that he was not given sufficient training regarding how to clean up the sewage. The evidence showed, however, that a plumber should possess sufficient knowledge of how to clean up sewage and that specialized training regarding the leak in this case was not necessary. In addition, Grievant observed a previous spill from the pipe in September 2011 that was cleaned up by contractors and he observed that the contractors used lime to clean the spill. Grievant knew or should have known to clean up the spill using lime and knew or should have known to find the lime as soon as possible.

Grievant argued that he told the Supervisor in the afternoon of November 7, 2011 that he could not finish the clean up process because he could not find lime to put down on the ground. Grievant argued that the Supervisor told Grievant that the Supervisor and another employee would obtain the lime. The Supervisor denied Grievant mentioned anything about lime to him on November 7, 2011. The Supervisor testified by telephone. Grievant failed to provide a sufficient motive for the Supervisor to be untruthful. The Supervisor's testimony was sufficiently credible to support the Agency's discipline.

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...."⁹ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any

⁷ He could have obtained lime from the water treatment plant or purchased it from a local vendor.

⁸ See Attachment A, DHRM Policy 1.60.

⁹ Va. Code § 2.2-3005.

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 III Written Notice of disciplinary action with a 24 hour suspension is **reduced** to a Group II Written Notice with a 24 hour suspension.

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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.