

Issues: Group II Written Notice with Suspension (unsatisfactory performance), Group I Written Notice (unsatisfactory performance), Group III Written Notice with Termination (unsatisfactory performance); Hearing Date: 12/07/12; Decision Issued: 12/28/12; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9979, 9980, 9981; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9979 9980 9981

Hearing Date: December 7, 2012
Decision Issued: December 28, 2012

PROCEDURAL HISTORY

On June 25, 2012, Grievant was issued a Group II Written Notice of disciplinary action with 10 a workday suspension for unsatisfactory performance. On July 20, 2012, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance. On September 17, 2012, Grievant was issued a Group III Written Notice with removal for unsatisfactory performance.

Grievant timely filed grievances to challenge the Agency's action. On November 6, 2013, EDR issued Ruling No. 2013-3466, 2013-3467 consolidating the grievances for a single hearing. On November 19, 2012, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 7, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notices?

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 employed Grievant as an Area Land Use Engineer at one of its Facilities. He had been employed by the Agency since August 2007. The purpose of his position was:

- To ensure the organizational objectives are met by applying the appropriate policies, procedures, guidelines, customer service principles, and values.
- Assist the District Administrator in coordinating land development programs.
- Serves as the responsible charge for land development issues. May conduct other responsible charge engineering activities for the Agency.
- Provide technical engineering expertise for all Agency operations, to ensure that all engineering activities are carried out in accordance with sound engineering principle and practices.
- Evaluates performance of personnel and quality of work.¹

¹ Agency Exhibit 5.

Grievant had prior active disciplinary action. On July 12, 2010, Grievant received a Group I Written Notice for unsatisfactory performance.²

Grievant drafted a memorandum dated June 14, 2012 in which he described a route as "19" when he intended to write "29". He also failed to begin a sentence with a capital letter. The Supervisor reviewed the memorandum. On June 14, 2012, the Supervisors sent Grievant an email stating:

Just a reminder to make sure you proofread your letters and memos before you send out. Note attached.³

Grievant replied by email on June 14, 2012:

If you (or [another employee]) are attempting to correct my emails and that is the most important thing you have to do you have too much time on your hands.⁴

The Supervisor perceived Grievant's response as disrespectful and inappropriate.

On June 20, 2012, two men entered the foyer of the Agency's building and asked to speak with someone about their concerns. The Receptionist determined which section she believed could best handle the request and contacted the Supervisor. The Supervisor believed Grievant would be the best person to address the concerns of the two men and he walked to the lunch room where Grievant was eating lunch with two other employees. The Supervisor asked Grievant to go to the entry foyer and speak with them. Grievant walked to the front entry and greeted the two men, Mr. E and Mr. C, who were professional engineers. Mr. E said he wanted to know why VDOT would not approve the use of their plastic storm drain pipe on a particular project. Grievant responded that the concrete pipe was a better product for the pipes under the road for the project. Mr. E stated "but the use of plastic pipe is allowed for in the VDOT standards." Grievant said he agreed but added that the approval indicated by inclusion on the Standards did not mean it was acceptable in all applications and that it was the responsibility of the design engineer and the review engineer to decide what was the best application for each project. Grievant finished his conversation with the two men and returned to the lunchroom.

Grievant spoke with Mr. P and two of his subordinates. He considered the subordinates to be his friends. Grievant told his coworkers that one of the two men may have been a salesman and he was inquiring as to why concrete pipe was specified on the project. Grievant said he told them that the application was not appropriate for the use of plastic pipe. They disagreed and an argument began. Grievant continued

² Agency Exhibit 5, p. 20.

³ Agency Exhibit 5.

⁴ Agency Exhibit 5.

saying he told them to submit documents in support of their argument and to leave because the meeting was over. He said he told the men “not to let the door hit them on the way out.” Actually, Grievant did not tell the men not to let the door hit them on the way out. He was embellishing his account to entertain his friends.

The Supervisor returned to the lunchroom to give Grievant the business cards of the two men. Mr. P was concerned about what Grievant claimed to have told the two men. Mr. P said that Grievant “needed to tell [the Supervisor] what he told us in the lunchroom about what he told the gentlemen.”⁵ Grievant told the story but left out the part about not letting the door hit them on the way out. Grievant said “I’m not smiling” and that Mr. P was out of line in asking Grievant to relate the story to the Supervisor. Grievant said it was his responsibility and place to inform the Supervisor if necessary. Mr. P left the lunchroom and later informed the Supervisor about what Grievant claimed to have told the two men.

The Supervisor was concerned that Grievant may have insulted the two men. He called Mr. E and requested that Mr. E provide an account of his interaction with Grievant. On June 21, 2012, Mr. E sent the Supervisor an email stating, in part:

A summary of the **stronger** responses from [Grievant] were as follows:

He doesn’t like plastic pipe. Just doesn’t like it. When asked why, he said flotation.

He stated that RCP is the preferred pipe. He didn’t want to hear about plastic pipe as he didn’t care. He has been an engineer for 50 years and knows what works.

He stated (several times) that he was upset that we disturbed his lunch.

He stated (several times) that he was not there to debate the issue and if we were then he would show us the door.

When I asked [Grievant] if we could schedule a future date and time to meet to discuss this (as he was visibly irritated and condescending) [Grievant] only provided his name and told me to call the front desk (he provided no phone number, no e-mail, no business card, nor a suggestion of someone else to speak to).

This negative interaction occurred in the front lobby of the District office which I felt to be even further unprofessional. Please confirm the above comments with the polite lady at the front as I’m sure she was able to hear everything.

I have worked with VDOT on All levels and have **never** had such a negative interaction. VDOT personnel have always been very professional even in times [when] we had differing opinions.⁶

⁵ Agency Exhibit 5, p. 8.

⁶ Agency Exhibit 5, p. 9.

On August 8, 2012, a final plan review meeting for the Town Streetscape project was held at the District complex. Grievant and Agency employees, Ms. E, Ms. H, Mr. H, attended the meeting. The Town Construction Inspector and the Engineering Consultant for the Town also attended the meeting. The “meeting was held for the purpose of providing comments from the final plan review to the consultant and Town.”⁷ Ms. E started the meeting by going around the room with introductions. She then asked Grievant to review the plan comments that his section had provided. Grievant’s words were “very hostile and stern” to the Engineering Consultant. Grievant said that the plans provided were unacceptable for construction and that in his opinion they were “woefully inadequate.” Grievant proceeded to review comments that were hand written on the plan review set. Grievant was very stern that the note on the first sheet was incorrect and how it should have been worded. He continued to make comments in a manner that was “stern.” Grievant continued making comments in a manner Ms. E found to be too abrasive. She suggested that the meeting end. She spoke with the Engineering Consultant and “apologized profusely for what I felt was inexcusable unprofessional behavior [by Grievant]. I was truly embarrassed by the hostility show in the entire meeting and do not ever plan to let [Grievant] conduct a review in my presence.”⁸

The Supervisor learned of the problems arising at the meeting. He asked the Engineering Consultant to respond. The Engineering Consultant sent the Supervisor an email on August 9, 2012 stating, in part:

I am providing these comments at your request, and am not filing a complaint.

[Grievant] was the primary reviewer and stated that review with the statement that he felt that the plans were “woefully inadequate”. I felt this was an inappropriate comment an unfortunate way to start the review. Rather than addressing the comment at that moment, I decided to go through the review to determine the basis for this comment.⁹

On August 9, 2012, Grievant sent the Engineering Consultant an email stating:

At our meeting yesterday I exhibited remarkably poor judgment with my prelude. While the expression was honest, it was poorly handled and for that I apologize. I am confident that you and your team will return with a viable document.¹⁰

⁷ Agency Exhibit 5, p. 10.

⁸ Agency Exhibit 5, p. 11.

⁹ Agency Exhibit 5, p. 15.

¹⁰ Agency Exhibit 5, p. 16.

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.”¹¹ 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.¹² 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.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his/her personnel file.

Group II Written Notice

Grievant’s work performance was unsatisfactory on June 20, 2012. During his interaction with the two visitors he said he was upset that they had disturbed his lunch. He was visibly irritated and condescending towards the two men. He showed a poor example by describing to his subordinates and coworkers that he told the two men not to let the door hit them on the way out. Grievant’s behavior rises to the level of a Group I offense. Because he had received a Group I Written Notice for unsatisfactory work performance on July 12, 2010, there exists a basis to elevate the disciplinary action to a Group II offense.

Group I Written Notice

Va. Code §2.2.-3000(A) provides:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of

¹¹ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

¹² See Attachment A, DHRM Policy 1.60.

employment disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

Grievant's June 14, 2012 email reflected his attempt to express his concerns to the Supervisor about how his work product was being reviewed by the Supervisor. Grievant's email was protected behavior under Va. Code § 2.2-3001(A). The Agency may not take disciplinary action against Grievant for his June 14, 2012 email. Accordingly, the Group I Written Notice must be reversed.

Group III Written Notice

On August 8, 2012, Grievant attended a plan review meeting that was not intended to be adversarial. Grievant began the meeting by describing the plans as "woefully inadequate". He spoke to the Town's representatives in an unnecessarily stern manner. He upset his co-worker who had to apologize for his behavior. He expressed poor judgment during the meeting and handled the meeting poorly. 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. Because he had received a Group I Written Notice for unsatisfactory work performance on July 12, 2010, there exists a basis to elevate the disciplinary action to a Group II offense.

The Agency argued that the discipline should be elevated to a Group III offense. Grievant's behavior was a Group I offense. A Group I offense cannot be elevated to a Group III offense under the Standards of Conduct. If a Group I has been elevated to a Group II offense on the basis of similar behavior, a subsequent similar offense does not justifying elevation to a Group III offense.

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 Human Resource Management"¹³ 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.

¹³ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance of a Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievant of a Group III Written Notice is **reduced** to a Group II Written Notice. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.¹⁴

[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

¹⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.