



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11647

Hearing Date: April 30, 2021
Decision Issued: May 3, 2021

PROCEDURAL HISTORY

On December 14, 2020, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow instructions, using obscene or abusive language, lack of civility in the workplace, and safety rule violation.

On January 12, 2021, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 25, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 30, 2021, a hearing was held by remote conference. Grievant was advised of the hearing date and time but did not participate.

APPEARANCES

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 a Transportation Operator II at one of its locations. He had been employed by the Agency for over 27 years.

Grievant had prior active disciplinary action. On March 11, 2019, Grievant received a Group II Written Notice for lack of civility in the workplace. On August 22, 2019, Grievant received a Group I Written Notice for unsatisfactory performance. On August 14, 2020, Grievant received a Group II Written Notice with a five workday suspension for unsatisfactory performance and violating a safety rule.

Grievant reported to Mr. R. Mr. M was also a supervisor who had the authority to give Grievant instructions. Grievant held the necessary certifications to flag traffic and set up work zones.

On November 10, 2020, the Agency was conducting a pipe flushing operation in a work zone. Grievant was working as a flagger at the work zone. He was responsible for controlling the flow of traffic around the work zone.

Mr. M1 was driving a pipe flushing truck and attempting to enter the work zone. It was important to keep the vehicle traffic out of the work zone for employee safety. Mr. M

told Grievant over the radio to hold vehicle traffic when the pipe flushing truck approached the work zone. Grievant heard the instruction. When Mr. M1 approached the work zone, he spoke with Grievant and said, "There are six to eight cars behind me so you need to hold as I enter the work zone." Grievant said, "Ok, thank you."

Once the truck approached the work zone, Grievant took no action to stop vehicle traffic. As a result, vehicle traffic followed the truck as the truck entered the work zone. Mr. M observed the vehicles following the truck into work zone. He got out of his vehicle and redirected traffic to prevent vehicles from entering work zone. He placed himself at risk of being hit by the vehicles.

Mr. M said to Grievant over the radio, "I thought I told you to hold the traffic?" Grievant did not respond. Mr. R asked Grievant over the radio why Grievant did not stop traffic as instructed by Mr. M. Grievant said, "I don't know."

When the employees returned to the headquarters, Mr. R spoke with Grievant about the incident. Mr. R tried to explain to Grievant the severity of his inaction. Grievant talked "over top of" Mr. R. Mr. R asked Grievant, "Did [Mr. M] tell you to stop traffic?" Grievant said "yes". Grievant began cursing. He said, "this god—mn f—king mess." Grievant turned and walked away from Mr. R and into the shop before Mr. R had finished speaking with Grievant.

On November 12, 2020, Mr. R spoke with Grievant and told Grievant that Mr. R needed a statement from Grievant about the incident on November 10, 2020. Grievant looked at Mr. R and said he did know what Mr. R was talking about. Mr. R reminded Grievant of the incident. Grievant began cursing and waving his hands and then preceded to walk back into the shop.

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."

Use of obscene language is a Group I offense. Failure to follow a supervisor's instruction or comply with policy is a Group II offense. Violating safety rules where there is a threat of bodily harm is a Group III offense. Violation of DHRM Policy 2.35, Civility in the Workplace, can be a Group III offense depending upon the severity of the behavior.

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

The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. On November 10, 2020, Grievant heard and understood Mr. M's instruction to hold traffic as the truck approached the work zone. Grievant disregarded that instruction and allowed traffic to follow the truck. Grievant's behavior endangered the safety of his coworkers. When confronted regarding his behavior, Grievant used obscenities and walked away from a Supervisor while the Supervisor was talking.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant did not attend the hearing or present any evidence to refute the Agency's disciplinary action.

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"² 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.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

² Va. Code § 2.2-3005.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.