

Issues: Group II (failure to follow instructions/policy), Group II (failure to follow instructions/policy), Group I (unsatisfactory job performance), Group III with transfer, demotion and pay reduction (conduct unbecoming); Hearing Date: 05/05/16; Decision Issued: 05/25/16; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 10759; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 06/07/16; EDR Ruling No. 2016-4369 issued 07/12/16; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 06/07/16; DHRM Ruling issued 07/25/16; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10759

Hearing Date: May 5, 2016
Decision Issued: May 25, 2016

PROCEDURAL HISTORY

On October 16, 2015, Grievant was issued a Group II Written Notice for failure to follow instructions and policy. On October 16, 2015, Grievant was issued a second Group II Written Notice of disciplinary action for failure to follow policy and instructions. On October 16, 2015, Grievant was issued a Group I Written Notice for unsatisfactory work performance. On October 16, 2015, Grievant was issued a Group III Written Notice for conduct undermining the effectiveness/efficiency of the Agency. Grievant was transferred. He was demoted to a lower pay band effective October 25, 2015.

Grievant timely filed a grievance to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 25, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 5, 2016, 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 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 State Police employed Grievant as a First Sergeant in one of its regions until he was demoted to Sergeant, transferred to another location. His compensation was reduced. Grievant was employed as a Trooper on February 1, 1985. He was promoted to Sergeant on July 1, 1994. He was promoted to First Sergeant on October 10, 2014.

Thirteen allegations were made against Grievant. Following an investigation, the Agency issued Grievant four Written Notices. The facts and conclusions relating to the allegations identified in the Written Notices are discussed below.

DISCUSSION

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." General Order ADM 12.02(11)(a). Group II offenses "include acts and behavior of a more severe and/or repetitive nature and are such that an additional Group II

offense should normally warrant removal.” General Order ADM 12.02(12)(a). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” General Order ADM 12.02(13)(a).

The Agency’s Written Notices each contain several allegations. The allegations must be evaluated individually to determine if any one of them supports the issuance of disciplinary action. If one of the allegations is sufficient to support the Written Notice, the Hearing Officer will not discuss the remaining allegations.

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”¹ 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.

Grievant transitioned into a new position with new subordinates, new office procedures, and many uncertainties regarding how to operate in that locality. Grievant assumed responsibility for an office that had limited and inadequate administrative support. This period of transition is a mitigating factor justifying reduction or elimination of some but not all of the disciplinary actions as discussed below.

Group II Written Notice -- Allegations 1 through 4.

General Order ADM 11.00 provides:

Any employee, who is the plaintiff in any civil action, is charged with a traffic infraction, learns that he/she may be the defendant in any civil or criminal action, or who is the subject of a protective order, shall report such actions to the Superintendent without delay.

Grievant was the defendant in several civil actions in a local General District Court. Warrant in debts and garnishments were filed against him on October 31, 2011, March 31, 2014, April 10, 2014, and March 20, 2015. Grievant did not report the civil actions to the Superintendent. Grievant failed to comply with the Agency’s policy thereby justifying the issuance of a Group II Written Notice.

¹ *Va. Code § 2.2-3005.*

Group II Written Notice – Allegations 5 and 6.

General Order ADM 3.11 provides, “The use of state-owned and state-leased automobile shall be limited to official state business.”

General Order ADM 6.0 states:

For the purpose of this policy, the term “residence” shall be defined as the residence address located within the geographic area established by special order at the time of assignment, verified as the employee’s official residence by the employee’s immediate supervisor, approved by the Division Commander and documented on the Personnel Information form (SP-2) and the Address Verification form (SP-2A). Sworn employee shall live at, and stay the night on a regular basis at their approved residence in order that they may be available to respond to calls for public and emergency service.

Prior to his promotion, Grievant resided in Locality 1. After being promoted to First Sergeant, Grievant asked the Agency to modify its Residency Policy to allow him to keep his residence in Locality 1. Grievant’s residence in Locality 1 was approximately 12 miles away from his duty post in the Area. The Agency Head denied Grievant’s request but authorized Grievant to delay establishing a new residence in Locality 2 until December 18, 2014. Grievant’s use of his State issued vehicle to drive from his residence in Locality 1 to his office located in Locality 2 did not give rise to the issuance of disciplinary action during the time period prior to December 18, 2014.

On December 15, 2014, Grievant signed a lease to rent a residence located in Locality 2 in the Area. He took occupancy of the property on December 19, 2014. He was on leave from December 22, 2014 to January 3, 2015. Grievant began living at the residence even though he maintained a second residence with his Wife in Locality 1. When Grievant worked, he was regularly at his residence in Locality 2. He parked his State issued vehicle at his residence in Locality 2.

The Agency has not presented sufficient evidence to support the issuance of a Group II Written Notice for failing to comply with the Agency’s residency policy. The Agency did not present sufficient evidence to show that Grievant misused his State issued vehicle. The Group II Written Notice must be reversed.

Group I Written Notice – Allegations 9, 10, and 11.

General Order OPR 6.00 provides “A quarterly inspection to determine adherence to property control procedures shall be conducted. In BFO area offices, the first Sgt. shall conduct a quarterly inspection to ascertain adherence to the procedures used for the control of property and shall maintain the inspection results in writing in the area office to be reviewed by the next level of supervision and/or the staff inspection team.

Grievant did not conduct a quarterly evidence inspection as required by policy.

Grievant was responsible for ensuring that monthly invoices were paid. Grievant processed payments for trash services beyond the invoice due date.

Grievant claimed to have worked on days he was off duty. His action was an error which he quickly corrected when the matter was brought to his attention.

The Agency's disciplinary action must be mitigated due to the difficulties Grievant experience transitioning to a new office with limited resources. Grievant had to prioritize his duties in order to transition to and improve the operations of the Area office. The Group I Written Notice must be reversed.

Group Written Notice III – Allegations 12 and 13.

General Order ADM 11.00 provides:

The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by employees is essential to ensure the proper performance of Department business and the maintenance of confidence by citizens of the Commonwealth.

Sworn employees will exercise sound discretion in carrying out duties and responsibilities. Such discretion should be based on Department policies and procedures, Departmental training, and supervisory recommendations.

Sergeant T and Trooper T were married. They worked in Grievant's Area Office and reported to him. Trooper T sometimes performed clerical duties because the Area Office did not have a full-time experienced administrative assistant. Grievant had to relieve Trooper T of some of her duties that he perceived as creating a conflict of interest. This and other changes imposed by Grievant created hostility between Grievant and Sergeant T. Several other troopers in the Area complained to Sergeant T about Grievant.

On November 14, 2014, Sergeant T filed a complaint against Grievant. Captain C spoke with Sergeant T and told Sergeant T that his complaints were about changes in procedures and not policy violations. Captain C told Sergeant T he would not take any action unless Grievant violated policy. On February 25, 2015, Sergeant T informed the Captain C of what he believed were policy violations by Grievant. Sergeant T claimed Grievant violated the Agency's residency requirements and told Captain C that Grievant had been served with subpoenas relating to a civil matter. Grievant was not aware of the details of conversations between Sergeant T and Captain C.

On March 20, 2015, Grievant met with Captain C who presented Grievant with a letter temporarily relieving Grievant of his duties and reassigning him to Division headquarters.

Grievant believed that his removal from the Area arose because of the actions of Sergeant T and several other troopers reporting to Sergeant T.

On March 26, 2015, Grievant and his Wife entered a local business and sent a one-page typed letter by fax to the Agency's Internal Affairs division. Grievant did not identify himself as the author of the letter. Grievant claimed "I am a trooper working in [Area]." The letter sought an investigation of the Area because Sergeant T and Trooper T were married and working in the same office contrary to General Order ADM 2.00. The letter claimed this "affects me and the other troopers." The letter claimed, "Me and other troopers didn't think it was fair that she was looking into all reports in our ticket numbers getting special treatment from her husband [Sergeant T]." The letter asserted that, "morale is bad and other troopers are scared to say something because they think [Sergeant T] will do something to them." The letter claimed that the trooper overheard Sergeant T tell Sergeant W "I got rid of [Grievant]".² The letter closed by saying, "Something needs to be done because it is not fair to all other troopers."³

The Agency's Investigator asked Grievant if he had sent the letter to the Agency. Grievant denied sending the letter. After the Investigator showed Grievant the pictures she had showing Grievant and his Wife sending the letter, Grievant admitted to sending the letter.

Grievant's behavior was not consistent with the Agency's "unusually high standards of honesty, integrity" Grievant misrepresented in the letter that he was a trooper in the Area even though he was no longer working in the Area and he held the rank of Sergeant. When Grievant was First Sergeant, he had the ability and authority to correct the problems he identified in his letter to Internal Affairs. Grievant could have filed a complaint with the Internal Affairs division using his actual name. The purpose of his letter was not to correct the identified problems but rather to obtain revenge against Sergeant T for his role in undermining Grievant's ability to perform his work duties as Grievant believed they should be performed. Dishonesty almost always rises to the level of a Group III Written Notice and this is especially true with the State Police where employees are expected to have unusually high standards of honesty. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. In lieu of removal, an agency may demote, transfer, and reduce the pay of an employee receiving a Group III Written Notice. Accordingly, the Agency's decision to demote, transfer, and reduce the compensation of Grievant must be upheld.

² Grievant could not have overheard such a statement since he was no longer working at the Area Office.

³ Agency Exhibit 4.

Grievant argued that the letter was not retaliatory against Sergeant T because Grievant did not know Sergeant T had filed any complaints against him until May 2015. The evidence showed the Grievant suspected Sergeant T was the “ringleader” behind the complaints giving rise to his transfer. Grievant may not have been aware of Sergeant T’s written complaint, but he was aware that Sergeant T was complaining about Grievant.

Grievant argued that his actions were protected under the Virginia Whistle Blower Protection Act. Section 2.2.-3010 defines whistleblower as:

"Whistle blower" means an employee who witnesses or has evidence of wrongdoing or abuse and who makes or demonstrates by clear and convincing evidence that he is about to make a good faith report of, or testifies or is about to testify to, the wrongdoing or abuse to one of the employee's superiors, an agent of the employer, or an appropriate authority.

Section 2.2 – 3011(C) provides:

To be protected by the provisions of this chapter, an employee who discloses information about suspected wrongdoing or abuse shall do so in good faith and upon a reasonable belief that the information is accurate. Disclosures that are reckless or the employee knew or should have known were false, confidential by law, or malicious shall not be deemed good faith reports and shall not be protected.

This Act does not apply because Grievant’s report was not made in good faith. Grievant was not a whistle blower under the Act. His objective was to cause harm to Sergeant T rather than correcting a problem he could have corrected but he was First Sergeant.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action for allegations 1,2,3, and 4 is **upheld**. The Agency’s issuance of a Group II for allegations 5 and 6 is **rescinded**. The Agency’s issuance of a Group I Written Notice for allegations 9, 10, and 11 is **rescinded**. The Agency’s issuance of a Group III Written Notice for allegations 12 and 13 is **upheld**. Grievant’s disciplinary transfer, disciplinary demotion, and disciplinary pay reduction 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 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.⁴

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

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer