

Issue: Group III Written Notice with Termination; Hearing Date: 01/18/18; Decision Issued: 01/19/18; Agency: Virginia Tech; AHO: Carl Wilson Schmidt, Esq.; Case No. 11117; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11117

Hearing Date: January 18, 2018
Decision Issued: January 19, 2018

PROCEDURAL HISTORY

On October 19, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow instructions/policy, unauthorized use of State property or records, and failure to report to work without notice.

On October 26, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On November 27, 2017, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On January 18, 2018, a hearing was held at the Agency's office. Grievant was provided the date, time, and location of the hearing, but did not appear.

APPEARANCES

Agency Party Designee
Agency's Counsel
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:

Virginia Tech employed Grievant as a Warehouse Worker. He had been employed by the Agency since 2015. No evidence of prior active disciplinary action as introduced during the hearing.

Grievant was responsible for delivering items from a central location to various dining halls and the Agency's farm. He drove an Agency owned refrigeration truck for much of his workday.

Grievant reported to work on September 7, 2017. His work hours were from approximately 5 a.m. until 2:30 p.m.

At approximately 10 a.m., Grievant entered his personal vehicle which was parked in an Agency parking lot. He was being watched by an Agency police officer who had received a report that Grievant was involved in illegal drugs. The Officer had researched the status of Grievant's driver's license and determined that Grievant's license was suspended as of April 20, 2017.

As the Officer approached Grievant's vehicle, the Officer detected a strong odor or marijuana coming from Grievant's vehicle. The Officer asked Grievant if he knew his license was suspended and Grievant replied "yes." The Officer asked Grievant if marijuana was inside his vehicle. Grievant said he had none. The Officer instructed

Grievant to step outside of the vehicle. Grievant said he did not consent to a search and would not get out of the vehicle. The Officer told Grievant that because the Officer detected the odor of marijuana, he did not need Grievant's consent to search the vehicle. The Officer again instructed Grievant to get out of the vehicle and Grievant refused. The Officer instructed Grievant for a third time to get out of the vehicle and Grievant refused.

The Officer opened the door to Grievant's vehicle. Grievant pulled the door shut and locked the door. The Officer reached inside the window of Grievant's vehicle to unlock the door. He put part of his body inside the open window. Grievant put his vehicle's transmission in drive and drove away while the Officer was partially inside the vehicle. The Officer detached himself from the vehicle's window. Because the Officer's body was partially inside the window of the vehicle, the Officer viewed Grievant's behavior as assaultive.

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."

Failure to follow instructions is a Group II offense.² On September 7, 2017, the Officer had the authority to instruct Grievant to get out of his vehicle. Grievant was obligated to comply with that instruction. The Officer instructed Grievant three times to exit the vehicle. Grievant refused to leave the vehicle thereby failing to follow the Officer's instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

In certain extreme circumstances, an offense listed as a Group II Notice may constitute a Group III offense. Agencies may consider any unique impact that a particular offense has on the agency. (For instance, the potential consequences of a security officer leaving a duty post without permission are likely considerably more serious than if a typical office worker leaves the worksite without permission.)

In this case, the Agency has presented sufficient evidence to support the elevation of the Group II Written Notice to a Group III Written Notice. Once Grievant refused to leave his vehicle, the Officer was obligated to physically remove Grievant

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.

from the vehicle. This created unnecessary danger and the risk of injury to the Officer. By creating this circumstance, Grievant's behavior was an extreme circumstance justifying the elevation of an otherwise Group II offense. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

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"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-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 III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and 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.

³ *Va. Code § 2.2-3005.*

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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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