Issue: Group I Written Notice (unsatisfactory performance, failure to follow policy, safety rule violation); Hearing Date: 01/15/19; Decision Issued: 01/16/19; Agency: VDOT: AHO: Carl Wilson Schmidt, Esq.; Case No. 11284; Outcome: No Relief – Agency Upheld; **Administrative Review Ruling Request received 01/30/19; EDR Ruling No. 2019-4853 issued 02/20/19; Outcome: AHO's decision affirmed.**

# *COMMONWEALTH of VIRGINIA*

***Department of Human Resource Management***

**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

## DECISION OF HEARING OFFICER

In re:

**Case Number: 11284**

Hearing Date: January 15, 2019
Decision Issued: January 16, 2019

## PROCEDURAL HISTORY

On August 24, 2018, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance, failure to follow policy, and safety rule violation.

On August 29, 2018, 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 November 5, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On January 15, 2019, 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. 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 employs Grievant as a Transportation Operator II at one of its locations. He has been employed by the Agency since 2016. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency requires employees operating Agency-owned vehicles to wear seatbelts while the vehicles are moving. Agency supervisors observed several employees not wearing seatbelts as required and issued those employees written counseling memos. Agency managers realized that not all employees were wearing seatbelts as required and instructed Agency supervisors to inform crewmembers of the safety rule requiring the use of seatbelts.

On August 1, 2018, the Maintenance Operations Manager sent supervisors an email stating:

> We recently have had a couple situations where the operators and passengers in state owned equipment were discovered not wearing their seatbelts. We have recently issued counsel letters for employees failing to comply with this safety rule and I wanted to make myself clear that from this point forward anyone discovered not wearing their seatbelt will be subject to a standards of conduct. This is to include any equipment that is equipped with a safety belt …. This is a safety rule #5 on your list of

> safety rules that are to be posted at your Ahqs. This is not only VDOT policy but a state law and we need to be utilizing the safety device. Please share this with your employees and print a copy and have each employee sign it to show that [they] have been made aware of this and returned it to me please. One copy with all signatures will suffice for each Ahq.[1]

Grievant reviewed the email and signed a printed copy.

On August 15, 2018, Grievant entered an Agency-owned truck to perform his work duties. The truck had a safety belt with a lap belt and shoulder harness attached. Grievant sat in the driver's seat. He pulled the safety belt from his left to his right and inserted the safety belt tongue into the seat buckle. The safety harness rubbed against his neck so he used his right arm to put the safety harness behind him. When he leaned back in his seat, the safety harness was between his back and the seat cushion. In the event of a front end vehicle accident, the safety harness would not be able to prevent his upper body from moving forward and hitting the steering wheel. This created a safety risk.

Another employee observed Grievant operating the Agency-owned vehicle. Because the shoulder harness was not visible to that employee, the employee concluded that Grievant was operating the vehicle without wearing a seatbelt. The matter was reported to Agency managers. Grievant was honest throughout the Agency's investigation.

On May 22, 2018, Grievant wrote a statement saying in part:

> The seatbelts in truck number [number] are dark gray in color, and I was wearing a dark colored shirt. I do not feel that accusing me of not wearing a seatbelt is fair. I was, in fact, wearing my seatbelt; however, it was not compliant with DMV's guidelines. My seatbelt was hooked, but the shoulder belt was placed behind my back since it does not fit me properly and I do not feel that having my seatbelt up against my neck is safe should an accident occur.[2]

## 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

[1] Agency Exhibit 4. The Agency did not identify the State statute violated or rely on violation of that statute as a basis for the disciplinary action.

[2] Agency Exhibit 2.

disciplinary action."[3] 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."

Agency Safety Rule #5 provides:

> Seatbelts shall be worn by all vehicle/equipment operators and passengers.

"[U]nsatisfactory work performance" is a Group I offense.[4] 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.

On August 15, 2018, Grievant was wearing his seatbelt while operating a State-owned vehicle as required by Safety Rule #5 and by the August 1, 2018 email. His work performance was unsatisfactory to the agency, however, because he was not wearing the seatbelt properly thereby undermining the ability of the shoulder harness to protect him in the event of a vehicle collision. The Agency properly characterized Grievant's behavior as a Group I offense and the written notice 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 …."[5] 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 contends the disciplinary action should be mitigated because the Agency inconsistently disciplined similarly situated employees. Grievant presented evidence showing that the Agency issued counseling letters in lieu of disciplinary action to four employees who were not wearing seat belts in April and July 2018. The Agency

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

[4] See Attachment A, DHRM Policy 1.60.

[5] Va. Code § 2.2-3005.

presented evidence showing that it notified Grievant on August 1, 2018 of his obligation to wear a seatbelt. The Agency presented a copy of a Group II Written Notice issued to an employee because that employee failed to wear a seatbelt on November 14, 2018.

There are both mitigating and aggravating circumstances in this case. The Agency's decision to issue counseling letters to employees in lieu of disciplinary action is a mitigating circumstance because Grievant was a similarly situated employee who received disciplinary action. The Agency's action of requiring Grievant to sign an email acknowledging Safety Rule #5 is an aggravating circumstance because it heightened Grievant's attention to the Agency's policy and notified him that the Agency would no longer only issue counseling memoranda. The Agency's action of issuing a Group II Written Notice to an employee who was not wearing a seatbelt on November 14, 2018 is an aggravating circumstance because it shows the Agency's pattern of taking disciplinary action for violation of Safety Rule #5 after August 1, 2018. When the mitigating and aggravating circumstances of this case are considered together, there is no basis to further reduce the disciplinary action issued to Grievant. Accordingly, the Group I Written Notice does not amount to the inconsistent application of disciplinary action and must be upheld.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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.

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.