

Issues: Group II Written Notice (failure to follow instructions & insubordination), and Group III Written Notice with Termination (falsifying a record); Hearing Date: 05/29/14; Decision Issued: 06/05/14; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10297, 10298; Outcome: Full Relief; **Attorney's Fee Addendum issued 07/24/14 awarding \$2,764.10.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10297 / 10298

Hearing Date: May 29, 2014

Decision Issued: June 5, 2014

PROCEDURAL HISTORY

On January 14, 2014, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions and insubordination. On January 14, 2014, Grievant was issued a Group III Written Notice of disciplinary action with removal for falsifying a record.

On February 3, 2014, Grievant timely filed grievances to challenge the Agency's action. On February 19, 2014, the Office of Employment Dispute Resolution issued Ruling No. 2014-3816, 2014-3817 consolidating the two grievances for a single hearing. On March 4, 2014, EDR assigned this appeal to the Hearing Officer. On June 3, 2014, 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 a Transportation Operator II at one of its Facilities. The Agency did not present copies of any prior active disciplinary action.

Grievant was owed money by his ex-wife for child support. A Show Cause Summons was issued against the ex-wife and pursued by the Department of Social Services. Grievant was to be a witness as part of the proceeding and was scheduled to appear in court on October 10, 2013. He appeared in court on October 10, 2013. The matter was continued until January 9, 2014 at 1 p.m. When Grievant returned to work, he presented his supervisor with a letter dated October 10, 2013 from the Clerk of Court stating:

Please be advised that [Grievant] was required to appear in the [Court] on October 10, 2013 at 1 p.m. and this matter is continued to January 9, 2014 at 1 p.m.¹

¹ Grievant Exhibit D.

The Agency deemed this letter inadequate and informed Grievant to provide additional evidence that he was in court on October 10, 2013. Grievant returned to the Clerk's office and obtained a copy of the Show Cause Summons issued to the ex-wife. The document showed a hearing date of October 10, 2013 at 1 p.m. and January 9, 2014 at 1 p.m. The Clerk had authenticated the document by using a stamp with red ink, signing her name, and signing the date of October 16, 2013. The stamp read:

I certify that the document to which this authentication is affixed is a true copy of a record in the ... Court General and Juvenile and Domestic Relations District Courts and I have custody of the record and I am the custodian of that record.²

Grievant also presented a copy of an Order of the Court stating findings of the Court, stating the Court's Order and stating that the case was continued to January 9, 2014 at 1 p.m. The Order was dated October 10, 2013. The Order stated that the Division of Child Enforcement and their Counsel were present. The Order stated that the ex-wife's Attorney was present. The Clerk stamped and signed the document to attest that the document was a true copy of the record found in the Court.

The Agency appears to have accepted the certified copy as sufficient to establish Grievant was in the Court on October 10, 2013.

On January 9, 2014, Grievant appeared at the Court. When he returned to work he presented the Agency with a letter dated January 9, 2014 from the Clerk stating:

Please be advised that [Grievant] was required to appear in the [Court] on January 9, 2014 at 1 p.m.³

Grievant requested Civil and Work-Related Leave prior to the court proceedings. The Agency denied Grievant's request for leave as inadequately documented. Grievant was advised to obtain additional documents to support his leave request.

A small community has a Fire House for its volunteer fire department. It is not unusual for the Fire House to be unmanned.

On December 19, 2013, the Fire Chief drafted a letter stating:

[Grievant] will be doing community service work for our fire department on the following days, December 26 and 27. Any questions or concerns feel free to contact [Fire Chief] at [telephone number].⁴

² Agency Exhibit 1.

³ Grievant Exhibit D.

⁴ Grievant Exhibit C.

Grievant provided a copy of letter to the Agency on December 20, 2013.

On December 26, 2013 and December 27, 2013, Grievant went to the Fire House and performed tasks to benefit the Fire House. This was his third time of providing community service at the Fire House.

On December 27, 2013, another employee, Mr. J, was performing community service at another local fire department. He took 8 to 10 oxygen bottles from the fire house at which he was working to the Fire House where Grievant was working. Mr. J observed Grievant at the Fire House sometime after lunch.

On April 18, 2014, the Fire Chief drafted a letter stating:

This letter is to inform you that [Grievant] came to the [Fire House] on December 26 and 27 to do work around our station. I was unable to be by his side as [Grievant] did the list of items I left for him but after work I returned to the station to find he had done everything I had asked. [Grievant's] work ethic was outstanding and we would be honored to have him back to aid in any projects we have in the future. [Grievant] went above and beyond what we had asked him to do. He returned to our station on the 28th of December and did extra work around our station without anyone asking him to. [Grievant] is an honest and trustworthy man and we hope to work with him. If you have any questions or concerns feel free to contact me.⁵

CONCLUSIONS OF POLICY

The Agency took disciplinary action by giving Grievant a Group II Written Notice and the Group III Written Notice with removal.

Group II Written Notice

DHRM Policy 4.05 governs Civil and Work-Related Leave. This Policy provides:

Civil and Work-Related Leave is granted to the employee to fulfill the civic duties and functions listed below. Agencies must permit employees to be away from work for these purposes:

- As required by a summons to jury duty.
- To appear as a crime victim or as a witness in a court proceeding or deposition as compelled by a subpoena or summons.
- To accompany the employee's minor child when the child is legally required to appear in court.

⁵ Grievant Exhibit C.

- To serve as an officer of election.
 - To serve as a member of a state council or board.
 - To attend his or her own naturalization ceremony.
- Civil and Work-Related Leave is not granted for use by an employee:
- who is a defendant in a criminal matter, where criminal matter means either an alleged misdemeanor or felony,
 - who has received a summons to appear in traffic court (except as a witness), or
 - who is a party to a civil case, either as plaintiff or defendant, or who has any personal or familial interest in the proceedings.

The Policy establishes an employee's responsibility to include:

Employees are responsible for providing appropriate documentation as directed by their agencies concerning events and travel time needed, and for completing appropriate leave requests.

The Policy establishes the Agency's responsibility to include:

If the employee does not provide adequate verification of the time missed, the agency may treat the absence as unauthorized. The agency may then apply their procedures for unauthorized leave and may: (1) charge the time missed to the employee's personal leave balances or to leave without pay; and, (2) impose discipline as specified in their policy.

The Agency contends the Grievant should receive a Group II Written Notice for failure to follow instructions and insubordination. The Agency contends the Grievant was instructed by a supervisor to provide adequate documentation of his attendance in court on January 9, 2014 and that he failed to do so.

The Agency's evidence is not sufficient to uphold the disciplinary action for several reasons. First, the Agency did not specifically identify what document would be sufficient to establish Grievant appeared in court. It is not clear that any such document existed. Grievant was not a party to the proceeding, he was a witness. The Court's October 10, 2013 Order showed the parties in attendance but it did not show the witnesses in attendance. There is no reason for the Hearing Officer to believe that the Court's January 9, 2014 Order would have shown the Grievant was in attendance. The Clerks' attested copy of the Summons given to the ex-wife does not establish that Grievant was at the hearing on October 10, 2013. Expecting Grievant to present a second attested copy of the summons would not establish that Grievant attended the January 9, 2014 hearing. Second, Grievant presented sufficient evidence to show that he was in Court on January 9, 2014. Grievant presented several document showing that he was required to appear in Court on January 9, 2014. Given that it is not clear any documents exist that would show his actual attendance in court on January 9, 2014, documents showing that he was required by the Court to appear on January 9, 2014 are

sufficient to meet the documentation requirements of the DHRM Policy 4.05. The Group II Written Notice issued to Grievant must be reversed.

The Agency should reconsider Grievant's request for leave on January 9, 2014 with the assumption that Grievant has provided adequate documentation to show that he was in Court on January 9, 2014.

Group III Written Notice

The Agency asserted that Grievant falsified a document when he claimed to have worked at the Fire House on December 26, 2013 and December 27, 2013. The Agency denied the Grievant was at the Fire House at any time on either of those days.

The Agency's evidence is insufficient to support the Group III Written Notice for several reasons. First, the Supervisor went to the Fire House on December 26, 2013 at 10:40 a.m. He looked for Grievant but could not find him. The Supervisor's attempt to find Grievant was not adequate. The Supervisor attempted to open the double doors on the far left of the front of the Fire House. Those doors were locked. The Supervisor did not attempt to open the single door on the far right of the front of the Fire House. That is the door the Grievant used to enter the Fire House. The Supervisor did not look behind the Fire House building. Grievant testified that he parked his vehicle in the back of the building most of the time. Second, on December 26, 2013 at 1:13 p.m., the Supervisor drove by the Fire House and observed a parked vehicle consistent with the color and size of Grievant's vehicle. Grievant testified that he had parked his vehicle in front briefly and then moved it to the back of the Fire House later. Third, the Supervisor returned to the Fire House on December 27, 2013 at approximately 10 a.m. He attempted to open the double doors on the far left of the building but they were locked. He did not attempt to open the door on the far right of the building which was unlocked. He did not look behind the Fire House to see if Grievant had parked there. Fourth, Mr. J went to the Fire House on December 27, 2013 to deliver oxygen bottles. He met and spoke with Grievant who was inside the Fire House. Mr. J was at the Fire House for approximately 5 minutes. Fifth, Grievant testified that he was working at the Fire House on December 26, 2013 and December 27, 2013. His testimony was credible. Sixth, although the Fire Chief was not at the Fire House when Grievant was working, the Fire Chief was willing to assert in writing that Grievant was at the Fire House working. The Fire Chief added that he had observed the work Grievant completed.

In summary, the Supervisor failed to check all of the doors to ensure they were locked. He failed to encircle the building to determine if a vehicle was parked behind the building. Grievant has established that a vehicle consistent with his personal vehicle was parked in the front of the Fire House on December 26, 2013 and that Mr. J observed Grievant at the Fire House on December 27, 2013. Grievant has established that he was at the Fire House on both days. The Agency has not established that Grievant was not present at the Fire House for any of the times he claimed to be working.

The Agency should reconsider Grievant's request for leave with the assumption that Grievant was working at the Fire House on December 26, 2013 and December 27, 2013.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **rescinded**. The Agency's issuance to the Grievant of a Group III Notice of Disciplinary action with removal is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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.⁶

[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

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 10297 / 10298-A

Addendum Issued: July 24, 2014

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁷ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.⁸

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's attorney presented a petition with a statement for services showing the provision of 21.1 hours of service. The hourly rate for attorney reimbursement is \$131. The petition is in order and will be granted.

AWARD

Grievant is awarded attorneys' fees in the amount of \$2,764.10.

⁷ Va. Code § 2.2-3005.1(A).

⁸ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

APPEAL RIGHTS

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer