

Issue: Group II Written Notice with Suspension (falsifying records); Hearing Date: 05/26/15; Decision Issued: 05/28/15; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10587; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10587

Hearing Date: May 26, 2015

Decision Issued: May 28, 2015

PROCEDURAL HISTORY

On February 20, 2015, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for falsifying records.

On February 25, 2015, 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 April 20, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 26, 2015, 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. 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 a Transportation Operator II at one of its facilities.

On August 19, 2014, Grievant was in the Yard where a large plow was suspended from the bucket of a Loader. He entered the Dump Truck and backed it in the direction of the plow. Mr. S was his spotter. Mr. S stood outside of the truck and helped guide Grievant as he backed the truck. Grievant backed the Dump Truck too close to the plow and the plow scraped the side of the Dump Truck causing damage to the Dump Truck. Grievant observed the damage to the Dump Truck. He drove the Dump Truck from the Yard to the Maintenance Shop. His trip lasted approximately 45 minutes. The Dump Truck was inspected by the equipment manager at the Maintenance Shop. Grievant called the Supervisor and the State Police to report the accident.

Grievant untruthfully reported to the equipment manager, the Supervisor, and the State Police how the accident occurred. He submitted a Supplemental Accident Report Form as part of the Agency's inquiry. He wrote:

Loader suspended plow, dump truck parked, moving a plow by hand. The plow touch[ed] the exhaust pipe cover bent a little bit.¹

Grievant did not disclose that Mr. S had observed the accident.

¹ Agency Exhibit 6.

The Agency gave Grievant notice of pending disciplinary action consisting of a Group I Written Notice and asked for his response prior to issuing the disciplinary action. As part of Grievant's response, he informed the Agency that Mr. S was a witness to the accident. Once the Agency learned that Mr. S had observed the accident, the Agency suspended issuance of disciplinary action until it further investigated the incident. Following its additional investigation, the Agency learned that Grievant had untruthfully reported the incident.

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."² 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."

"[F]alsifying records" is a Group III offense.³ On August 19, 2014, Grievant backed a Dump Truck into a plow causing damage to the Dump Truck. He reported to Agency employees that the damage to the truck was caused when he pushed the suspended plow and it hit the stationary Dump Truck. He submitted a Supplemental Accident Report Form reiterating this assertion that he knew was untrue. The Form was part of the Agency's records of the incident. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. The Agency mitigated the disciplinary action to a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days.⁴ Accordingly, Grievant's five work day suspension must be upheld.

Grievant argued that he was truthful in his account of the accident. No credible evidence was presented to support this assertion. Indeed, in his response to the notice of a pending Group I Written Notice, Grievant claimed he had "been charged with accident without driving any equipment." In his response to the pending Group II Written Notice, Grievant admits "I was clearly the driver"

Grievant argued that the Agency expressed its intent to issue him a Group I Written Notice but then issued a Group II Written Notice instead. He argued this was improper. The Agency is not bound by its initial expression of an intention to issue a

² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

⁴ The Agency presented evidence that Grievant had a prior active Group II Written Notice arising out of the facts of this case but that he had not appealed. Grievant asserted he had appealed the Group II Written Notice. Whether Grievant had prior active disciplinary action does not affect the outcome of this case. Thus, the Hearing Officer will assume for the sake of argument that Grievant had no prior disciplinary action.

Group I Written Notice. It suspended issuance of the Group I Written Notice while it further investigated the incident. The Agency's actions were not contrary to any policy or for an improper purpose.

Grievant asserted that the Agency discriminated against him. No credible evidence was presented to support this allegation.

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 argued that Mr. S should have received disciplinary action because Mr. S was involved as a spotter when Grievant backed up the truck. No evidence was presented to show that Mr. S was at fault when spotting for Grievant. In addition, Mr. S truthfully responded to the Agency's questions when he was asked about the event.

In light of the standard set forth in the Rules, 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 a five workday suspension 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:

⁵ Va. Code § 2.2-3005.

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.