

Issue: Group II Written Notice (failure to follow instructions/policy); Hearing Date: 11/04/13; Decision Issued: 11/13/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10188; 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: 10188

Hearing Date: November 4, 2013
Decision Issued: November 13, 2013

PROCEDURAL HISTORY

On July 2, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy and failure to follow a supervisor's instructions.

On July 29, 2013, 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 October 2, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The hearing was originally scheduled but then continued after the Hearing Officer found just case for the continuance. On November 4, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
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 Department of Corrections employs Grievant as a Corrections Officer at one of its facilities. Grievant was working as a key control officer from April 2012 until January 2013. Post Order 15 described Grievant's job summary as:

Maintain proper maintenance and accountability of keys and key rings as prescribed by Local Operating Procedure #430.3, Key Control & Locking Devices, and other applicable policies and procedures. Be thoroughly familiar with the Post Order General Duties as well as the specific duties of this post.

His general duties included:

Inspect and account for all equipment assigned to this post and document such on the appropriate inventory sheet(s) prior to assuming the post. Report any missing or damaged equipment to your supervisor immediately and document such in the post log book.¹

No evidence of prior active disciplinary action was introduced during the hearing.

¹ Agency Exhibit 3.

When an employee needs to use an Agency vehicle, the employee presents a chit to the key control officer who works in the armory. The key control room officer removes the key from a backboard. Attached to the key is a vinyl pouch containing a card the size of a credit card enabling the user to purchase fuel from a gasoline pump. The key control officer hands the key with the vinyl pouch to the employee who provided the chit. The key control officer writes in a log book the name of the person taking the key and the vehicle being used. When the employee finishes using the Agency vehicle, he or she brings the key with the pouch to the key control officer who returns the chit to the employee.

The armory is not open every hour that the Facility is open. Sometimes employees need to use Agency vehicles after the key control officer has left for the day. A supervisor could enter the armory and obtain a key with a fuel card and give it to an employee needing to use an Agency vehicle. If the employee returned the key and fuel card when the armory was not open, the employee would leave the key and fuel card in a front entry room. When the armory opened, the key control room officer would obtain the keys from the front entry room and return them to the board. Sometimes the keys would be returned without fuel cards.

On June 1, 2012, Grievant's supervisor, Sergeant B, discovered that a fuel card for Vehicle 159 was missing. She spoke with Officer P who had been given the vehicle. Officer P said that when Grievant gave him the key, a fuel card was not attached to the key, and that Grievant was aware that the fuel card was missing. On June 1, 2012, Sergeant B sent Grievant an email stating, in part:

Today I discovered that gas card 159 was missing and when I tracked the vehicle back into the last person that used it, I was advised that the armory staff was aware that the gas card was missing. When things of this nature happen, I need to know so that I can get the ball in motion to have the card deactivated. In cases like this I need to be notified via email or verbally whichever is the most convenient to ensure that I receive the information in a timely manner. Then if necessary an incident report needs to be written for documentation and so the correct people are notified. In my [absence] the major is your immediate supervisor and if there is a problem with the armory please contact him. I don't know how to express the importance of reporting the information to me because when [I] am unaware and am questioned about the situation it does not look good. Also, once its report[ed] to me the issue now becomes mine and not yours and I will be held accountable so please ensure that you follow your chain of command.²

An employee returned the key to Vehicle 922 without a fuel card. An employee was removed from employment on October 10, 2012. The Agency suspected that the

² Agency Exhibit 4.

former employee began using the fuel card for personal use. He purchased gasoline and fuel in the amount of \$26,380.48 from October 2012 until January 8, 2013.

Officer B worked part-time in the armory. He typically worked in the armory from 6 a.m. until 8 a.m. when he was relieved by the key control officer and began assuming his other duties at the Facility. Officer B discovered that the fuel card for Vehicle 922 was missing. He told Grievant that the fuel card for Vehicle 922 was missing. Grievant acknowledged he thought the card was missing. Grievant did not report to any supervisor that the fuel card for Vehicle 922 was missing.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses “include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force.”³ Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal.”⁴ Group III offenses “include acts and behavior of such a serious nature that a first occurrence normally should warrant removal.”⁵

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with applicable established written policy” is a Group II offense.⁶ On June 1, 2012, Grievant was instructed by his supervisor to inform her if a fuel card was missing. Officer B told Grievant that the fuel card to Vehicle 922 was missing. Grievant understood Officer B’s comment and knew that the fuel card was missing. Grievant did not report to Sergeant B or any superior that the card was missing. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for failure to follow a supervisor’s instructions.

Grievant argued that he could not report a gas card he did not know was missing. The evidence showed that Officer B told Grievant that the fuel card to Vehicle 922 was missing. Grievant knew the card was missing but failed to follow Sergeant B’s instructions to inform a superior.

Grievant argued that there was not a perimeter supervisor from June 2012 through December 2012 and, thus, no one performing supervisory duties. The evidence showed that Grievant was instructed to report missing fuel cards to Sergeant B or the Major in Sergeant B’s absence. Grievant did not report the matter to the Major.

³ Virginia Department of Corrections Operating Procedure 135.1(V)(B).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁵ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁶ Virginia Department of Corrections Operating Procedure 135.1(V)(C)(2)(a).

Grievant argued that he had too many duties with too few coworkers to assist him to comply with the instruction. Although Grievant was busy, the evidence was insufficient for the Hearing Officer to conclude that limited staffing and Grievant's duties prohibited him from complying with Sergeant B's instruction.

Grievant argued that he did not receive adequate training on key control procedures. Grievant argued that the Agency failed to conduct monthly and daily inventory reports regarding missing fuel cards. He argued that if a better system was in place, the missing card could have been discovered sooner. Although these defenses may have related to some of the Agency's other claims about a failure to follow policy, they are unnecessary to address because the Agency has established that Grievant failed to comply with a supervisor's instructions thereby justifying the issuance of a Group II Written Notice.

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"⁷ 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 II Written Notice of disciplinary action 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

⁷ Va. Code § 2.2-3005.

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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.