

Issue: Group III Written Notice with Suspension (violation of safety rule where there is threat of bodily harm); Hearing Date: 07/02/19; Decision Issued: 07/22/19; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 11351; Outcome: Partial Relief; **Administrative Review Ruling request received 08/06/19; EDR Ruling No. 2020-4968 issued 08/19/19; Outcome: Remanded to AHO; Remand Decision issued 08/22/19; Outcome: Suspension reinstated; Administrative Review Ruling Request on Remand Decision received 09/05/19; EDR Ruling No. 2020-4984 issued 09/20/19; Outcome: AHO's Remand Decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11351

Hearing Date: July 2, 2019
Decision Issued: July 22, 2019

PROCEDURAL HISTORY

On February 28, 2019, Grievant was issued a Group III Written Notice of disciplinary action with a five workday suspension for violation of a safety rule where there is a threat of physical harm.

On March 16, 2019, 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 29, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 2, 2019, 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. 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 facilities. No evidence of prior active disciplinary action was introduced during the hearing.

On January 17, 2019, Grievant was in charge of a crew laying pipe at the end of a driveway. Mr. C was seated inside the cab of a Gradall with a boom and bucket. Mr. C operated the Gradall using two joysticks. One of the joysticks controlled the left to right movement of the boom and bucket. Mr. C kept the cab door open as he operated the Gradall.

The crew encountered a problem with one of the pipes not laying flat. Mr. J got into the ditch where the pipe was located. He was moving rocks around the large pipe. Most of his body was below the ground surface. Mr. C could see Mr. J in the ditch.

The engine of the Gradall was loud making it difficult for staff to communicate. If one employee wanted to get the attention of the Gradall operator, the employee was supposed to use hand signals.

Grievant and Mr. C began having a heated discussion about how to get the pipe straight. Grievant climbed onto the Gradall as it was being operated. It was not common for employees to climb on to an operating Gradall the way Grievant did so. Grievant did not use a hand signal to tell Mr. C that he was getting onto the Gradall. Grievant leaned into the cab and startled Mr. C. Grievant bumped Mr. C who was holding a joystick. Grievant's arms touched the back of Mr. C's shoulder. Mr. C's whole body moved which caused the joystick to move. Once the joystick was moved, it caused the bucket to swing horizontally towards Mr. J. Mr. J saw the bucket coming his way. He closed his eyes and braced for impact. The bucket stopped a few inches from Mr. J's head. If the bucket had not stopped, it would have hit Mr. J in the shoulder and/or head causing him serious injury. After realizing how close he came to being severely injured, Mr. J was upset; but he kept his composure.

The matter was reported to Agency managers who began an investigation.

For the pay period February 25, 2019 through March 9, 2019, Grievant paid \$145 for the employee portion of his health insurance. For the pay period March 10, 2019 through March 24, 2019, Grievant paid \$145 for the employee portion of his health insurance. For the pay period March 25, 2019 through April 9, 2019, Grievant paid \$145 for the employee portion of his health insurance. For the pay period April 10, 2019 through April 24, 2019, Grievant paid \$145 for the employee portion of his health insurance.

Grievant's five workday suspension started on March 1, 2019. The Agency improperly cancelled Grievant's health insurance. On February 28, 2019, the HR Consultant received notification of Grievant's Leave Without Pay suspension from the HR Supervisor.¹ The HR Consultant processed the transaction in PMIS on March 1, 2019. This generated a health benefits termination date of March 31, 2019 in the Benefits Eligibility System. The HR Consultant did not process Grievant's return to work on March 8, 2019 in PMIS due to an oversight.

Grievant went to his pharmacy to obtain his prescription medication. He could not get his prescribed medication because the Agency had cancelled his health insurance. Grievant's health insurance card would not work. Grievant told an employee of the pharmacy that he needed his medication. The employee said there was nothing that could be done. Grievant's son was also on his health insurance. His son called Grievant and said the same thing had happened to the son.

On April 5, 2019, Grievant contacted the Benefits Administrator and explained he was trying to obtain a prescription and the pharmacist stated that Grievant no longer had healthcare coverage.

The Benefits Administrator contacted the HR Consultant to obtain information about the transaction the HR Consultant entered on March 1, 2019. The Benefits

¹ The Written Notice was issued on February 28, 2019.

Administrator processed the return to work and reestablished Grievant's health benefits. Grievant's file did not show a lapse in coverage.

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."

The Agency had Safety Rules posted in its work place. One of the rules stated, "[d]isruptive or unsafe behavior ... is prohibited."³

Violating safety rules where there is a threat of physical harm is a Group III offense. On January 17, 2019, Grievant climbed onto a Gradall while operated by Mr. C without first signaling Mr. C. Grievant reached into the cab startling Mr. C and pushing against Mr. C's body with sufficient force to cause the joystick in Mr. C's hand to move. Once the joystick moved, it caused the bucket to swing towards Mr. J. This frightened Mr. J and almost caused him significant injuries. Grievant's behavior was unsafe and violated the Agency's safety rule. Grievant created a risk of physical harm to Mr. J. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

Grievant argued that the worksite is inherently dangerous and that Mr. J put himself in a dangerous position by being in the ditch. Regardless of whether operating heavy equipment around people can be dangerous, Grievant was obligated to refrain from making the situation any more dangerous. Grievant's actions substantially increased the risk of injury to another employee.

Grievant argued the bucket was several feet above Mr. J's head and did not pose a threat of injury. Grievant's argument is not persuasive. Mr. J testified the bucket would have hit him if it had not been stopped. Mr. J had the best opportunity to determine whether he was at risk of physical harm.

Grievant argued that the Group III Written Notice was excessive. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice.

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

³ Agency Exhibit 8.

Suspension

1 VAC 55-20-410(A) provides:

1. Coverage generally continues with the state contribution through the end of the month in which the suspension began. However, if the suspension was effective on or before the first work day of the month, there will be no coverage for that month unless the employee is reinstated in time to work half of the work days in the month. For example, if a suspension is effective on April 19, the employee will have coverage with the state contribution through the end of April. If the suspension is effective April 1, the employee must pay the entire cost of coverage for the month of April. By the same token, if the suspension is effective April 2 and the employee's first workday in April is April 3, the employee will not have the state contribution in April.

DHRM Policy 1.60(D)(2)(d) provides:

Health insurance. A suspended employee's health insurance coverage continues until the end of the month in which the suspension began, except that there shall be no break in coverage if the employee is reinstated in time to work half of the workdays in the following month. If the length of the period of suspension results in a break in health insurance coverage, the suspended employee must be notified that he/she may retain his or her group insurance coverage for up to 12 months by paying the monthly insurance premiums (both the employee's and state's contribution) in advance and in accordance with state guidelines. This 12 month extension runs concurrently with the 18 months granted under the Extended Coverage provisions of the health benefits plan.

The Agency improperly suspended Grievant. The Agency's suspension included a loss of pay and also a loss of health insurance. The Agency knew that Grievant's suspension was for only five workdays and should have known not to take any action regarding his health insurance. A five workday suspension should not include a suspension of health insurance.

The Agency's improper behavior regarding Grievant's health insurance placed Grievant's health at risk because he was at risk of being refused health services. He was told by a pharmacist that he did not have health insurance to pay for the cost of his prescription medication. Grievant's son had a similar problem getting prescribed medication.

The Agency combined a loss of pay and loss of health benefits as part of its suspension of Grievant. Because the Agency's suspension was contrary to DHRM Policy 1.60 and State law, the suspension must be reversed.

The Agency presented evidence that it reinstated Grievant's health insurance so that there was no lapse in coverage. Reinstating Grievant's health insurance is meaningless. It did not undo the harm to Grievant. He was unable to purchase his medication because he lacked health insurance. Grievant was a pay band 2 employee and there is no evidence suggesting Grievant had sufficient savings to allow him to pay the cost of the medication from his savings and seek reimbursement from the health insurance company once his policy was reinstated. The appropriate remedy for Grievant is to have the five work day suspension reversed with backpay.

Mitigation

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"⁴ 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 further 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 is **upheld**. The Agency's suspension of Grievant for five work days must be **rescinded**. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension. The Agency is directed to provide **back benefits** including health insurance and credit for leave and seniority that the employee did not otherwise accrue.

APPEAL RIGHTS

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

⁴ Va. Code § 2.2-3005.

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 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 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

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



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case No: 11351-R

Reconsideration Decision Issued: August 22, 2019

RECONSIDERATION DECISION

On August 19, 2019, the Office of Employment Dispute Resolution issued Ruling 2020-4968. Grievant presented ample evidence to show that the Agency improperly ended Grievant's health insurance benefits and that he was denied services by a pharmacist because his health insurance was ended by the Agency. Grievant's assertions were confirmed by the Agency's admissions. EDR has concluded there is no remedy to Grievant for the Agency's misbehavior. In accordance with that Ruling, the Group III Written Notice with a five workday suspension is upheld.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer