Issues: Group II with Suspension (safety rule violation), Group II with Termination (failure to follow instructions, insubordination, disruptive behavior), and Retaliation (other protected right); Hearing Date: 08/06/15; Decision Issued: 08/26/15; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10640; Outcome: Partial Relief; **Attorney's Fee Addendum issued 09/11/15 awarding $3,406.00.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10640

Hearing Date: August 6, 2015
Decision Issued: August 26, 2015

PROCEDURAL HISTORY

On May 12, 2015, Grievant was issued a Group II Written Notice of disciplinary action with suspension for safety rule violation. On May 12, 2015, Grievant was issued a second Group II Written Notice of disciplinary action with suspension for failure to follow instructions and/or policy, insubordination, and disruptive behavior. Grievant was removed from employment effective May 2, 2015.

On June 8, 2015, Grievant timely filed grievances to challenge the Agency's actions. The matter proceeded to hearing. On July 1, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 6, 2015, 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?

5. Whether the Agency retaliated against Grievant.

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 Maintenance Crew Member at one of its facilities. He began working for the Agency in February 2013. He received an overall rating of "Contributor" on his 2014 performance evaluation. Grievant had prior active disciplinary action. He received a Group I Written Notice on January 9, 2015.

The Agency had a Dump Truck that it made available to its employees including Grievant. The Dump Truck had a bed used to haul materials such as rock. The front part of the bed could be tilted upward so that the contents inside the bed would fall from the back of the bed into a spreader. The spreader was attached to the truck bed. An operator on the spreader could release rock onto the roadway below as the Dump Truck moved slowly over a road. At the front of the truck bed was a layer of metal referred to as the cab shield. When the truck bed was horizontal, the cab shield extended over the roof of the Dump Truck. In other words, if a driver was sitting in the cab of the Dump Truck, the cab roof would be directly above him or her and the cab shield would be above the cab roof. The Dump Truck bed was approximately 4 ½ feet above the ground. The cab shield was approximately 8 ½ feet above ground.

On March 26, 2015, Grievant was operating a Dump Truck carrying stone to a job site. Another employee used a machine to load stone into the Dump Truck but overloaded the truck. Grievant did not inspect the truck load and did not realize the truck was overloaded. When Grievant drove his Dump Truck around the corner, a

portion of the stone fell out of the truck and onto the roadway creating a potential hazard to other drivers. In response to the Agency's allegations, Grievant wrote "if I had known or not been over loaded, the stone would not have spilled."[1]

On April 3, 2015, Grievant was at a jobsite with other employees. A Dump Truck was also at the jobsite. Grievant climbed on top of the cab shield and stood there. He was not wearing a safety harness and he was more than eight and half feet from the ground. There was no business need for Grievant to climb on top of the cab shield

On April 3, 2015, Grievant was responsible for shoveling rock into the spreader. He failed to keep rock shoveled into the spreader.

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 combined several separate factual incidents into two written notices. Each incident must be considered in order to determine if any of the incidents support disciplinary action.

Group II Written Notice – Violation of a Safety Rule

"[V]iolation of a safety rule or rules (where no threat of bodily harm exists)" is a Group II offense.[3] The Agency had a safety rule requiring operators of Dump Trucks to walk around their vehicles before driving them to ensure that the trucks were not overloaded. On March 26, 2015, Grievant's Dump Truck was overloaded with stone by another employee. Grievant failed to inspect the load for driving the truck. When his vehicle turned a corner, stone fell onto the roadway creating a potential hazard for other drivers. Grievant failed to comply with the Agency's safety rule. The Agency had a safety rule prohibiting employees from being higher than 4 feet from the ground without safety harness ("fall protection"). Since the Agency did not provide safety harnesses to its employees, the employees could not be higher than 4 feet from the ground without a valid business purpose. On April 3, 2015, Grievant stood on top of a cab shield of a Dump Truck. He was more than 8 ½ feet above ground. He was not wearing a safety vest. He did not have any business reason to stand on top of the Shield. Grievant

[1] Grievant Exhibit 1.

[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.

failed to comply with the Agency's safety rule. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice for violation of a safety rule.[4] Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant's suspension from May 5, 2015 through May 12, 2015 must be upheld.

Group II Written Notice for Insubordination

State Agencies may not take disciplinary action against employees for engaging in protected activities. To permit such disciplinary action would have the effect of retaliating against the employee.

Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right **otherwise protected by law**."4 (Emphasis added).

One of the EDR Director's duties includes interpreting the Grievance Procedure Manual. Hearing Officers are obligated to comply with the EDR Director's interpretation of the Grievance Procedure Manual and applicable statutes regardless of whether the Hearing Officer agrees or disagrees with that interpretation. In EDR Ruling 2008-1964, 2008-1970, the Director addressed the following allegation:

> The grievant asserts that she asked her supervisor to reconsider her annual performance evaluation. When her supervisor refused to do so, the grievant asked her supervisor's supervisor (the reviewer) to reassess her evaluation. The grievant asserts that shortly after the reviewer modified her evaluation, her supervisor screamed at her on a number of occasions, called her a liar, and threatened to "write her up" (issue formal discipline).

Virginia Code § 2.2-3000(A) states:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management. To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of

[4] The Agency also alleged the Grievant violated a safety rule while working as a "flagger" at a jobsite. Insufficient evidence was presented for the Hearing Officer to conclude the Grievant was at fault for permitting traffic to pass. The incident appears to have resulted from in adequately operating radios and the inability to see other employees. It does not appear that Grievant intentionally released traffic when instructed not to do so.

> employment disputes that may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The EDR director concluded:

> Under Virginia Code § 2.2-3000, "[i]t shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints. To that end, employees shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Thus, bringing a concern about an annual performance evaluation to a reviewer would appear to be an act "otherwise protected by law."

The EDR Director has broadly interpreted Virginia Code § 2.2.-3000 to define as protected activities (otherwise protected by law) attempts by employees to freely discuss their concerns with Agency management.

In EDR Ruling 2009-2128, the EDR Director narrowed the protection as follows:

> This protection, however, is not without exception. For instance, an employee might still be disciplined for raising workplace concerns with management if the manner in which such concerns are expressed is unlawful (for instance, a threat of violence to life or property) or otherwise exceeds the limits of reasonableness. The limited exceptions to the general protection of employees who raise workplace concerns can only be determined on a case-by-case basis. Further, under analogous Title VII retaliation case law, it is important to note that: [a]lmost every form of 'opposition to an unlawful employment practice' [the "protected act" under Title VII] is in some sense 'disloyal' to the employer, since it entails a disagreement with the employer's views and a challenge to the employer's policies. Otherwise the conduct would not be 'opposition.' If discharge or other disciplinary sanctions may be imposed simply on 'disloyal' conduct, it is difficult to see what opposition would remain protected. The same can be said for the ability of an employee to raise their workplace concerns with management, which the General Assembly has protected in Virginia Code § 2.2-3000.

In this case, the Agency took disciplinary action against Grievant, in part, because of his protected activities. This is clear from the Written Notice which addresses Grievant's conversations with the Superintendent and states,

> During this time you became argumentative and would not listen to reasoning from your superintendent. You continued to bring up the past. ***
>
> Again you became argumentative and continued to bring up the past. ***

> At that time you accused him of lying again and that he was trying to get you fired. ***
>
> You would not listen to him and became very argumentative; you began blowing, jerking, rolling eyes and became very loud. [The Superintendent] told you he was not going to argue with you and asked you if you understood what he was attempting to share with you. You did not answer but walked out. ***
>
> On March 16, 2015, the District HR Manger, your superintendent and I met with you regarding several issues you had brought up to your management. You became argumentative at that time and had to be asked to calm down twice by the HR manager, called your superintendent a liar three times and pointed your finger shaking it and called your management incompetent. At that time, you were told that you must stop this behavior immediately.

When Grievant's protected behavior is excluded from consideration, the Agency has not presented sufficient evidence to support the issuance of a Group II Written Notice.

The Agency argued that Grievant was insubordinate, a Group II offense. Insubordination requires some evidence that an employee has defied or denied a supervisor's authority to supervise. Arguing with supervisors is not in itself insubordination. Calling a supervisor incompetent is not the same as denying a manager's right to manage. Grievant was not insubordinate.

The Agency has presented evidence sufficient to support the issuance of a Group I Written Notice for unsatisfactory work performance.[5] On April 3, 2015, Grievant was responsible for shoveling rock into the spreader. He failed to do so several times because he was watching for power lines. Grievant argued that he was instructed to watch for power lines while the truck moved to ensure safety of the employees. Even if Grievant was instructed to watch for power lines, doing would not be his sole obligation. He was assigned responsibility to shovel stone into the spreader but he failed to do so adequately.

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 …."[6] Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any

[5] Although a Group I Written Notice is not sufficient to suspend an employee, Grievant's suspension from May 4, 2015 through May 12, 2015 is supported by the Group II Written Notice for violation of a safety rule.

[6] Va. Code § 2.2-3005.

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 the Agency inconsistently disciplined its employees because employees were permitted to get on top of materials in a Dump Truck bed to spread out the materials. By doing so, the employees were more than four feet off the ground yet they were not disciplined. Grievant was not similarly situated with those employees. He was not disciplined for standing in a truck bed which might be four and a half to six feet off the ground, he was disciplined for standing on top of a cab shield which was more than eight and a half feet above the ground. He had no railing or other support to break his fall whereas an employee standing in the truck bed would have the walls of the bed to catch them if they fell. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;[7] (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.[8]

Grievant argued the Agency took disciplinary action against him as a form of retaliation. Grievant engaged in protect activity when he complained to Agency managers about other employees smoking. He suffered an adverse employment action because he received disciplinary action. Grievant has not established a connection between his protected activity and the Agency's disciplinary action. The Agency took

[7] See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[8] This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

disciplinary action because it believed Grievant engaged in misconduct and not as a form of retaliation.

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 with suspension for violation of a safety rule is **upheld**. The Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension for failure to follow instructions and/or policy, insubordination, and disruptive behavior is **reduced** to a Group I Written Notice.

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.[9]

[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

[9] 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: 10640-A

Addendum Issued: September 11, 2015

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.[10] 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.[11]

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 counsel submitted a petition showing 26 hours of work related to the hearing. The rate allowed by EDR is $131 per hour.

AWARD

Grievant is awarded attorneys' fees in the amount of $3,406.00.

[10] Va. Code § 2.2-3005.1(A).

[11] § 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

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Carl Wilson Schmidt, Esq.
Hearing Officer