

Issue: Group II Written Notice with disciplinary transfer (failure to follow policy);
Hearing Date: 10/05/15; Decision Issued: 10/19/15; Agency: VSP; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10659; 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: 10659

Hearing Date: October 5, 2015
Decision Issued: October 19, 2015

PROCEDURAL HISTORY

On March 11, 2015, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow policy. Grievant received a disciplinary transfer effective March 21, 2015.

On April 9, 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 August 24, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 5, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
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 Department of State Policy employs Grievant as a Trooper Senior at one of its locations. He began working for the Agency in November 1993. Grievant had prior active disciplinary action consisting of a Group II Written Notice issued April 25, 2013.

Virginia commercial motor carrier companies must maintain their truck fleets in accordance with Virginia safety laws and regulations. Grievant was one of several Agency employees responsible for inspecting trucks owned by motor carriers to ensure the trucks were equipped to operate safely. He could issue tickets to companies with defective trucks and could prevent a truck from operating on Virginia's highways until a defect was corrected.

Grievant desired to help a veteran's charity. He believed he could enhance the charity's visibility and increase donations to the charity by building a race car and taking it to events. He did not intend to enter the vehicle into racing competitions. His objective was to advertise for the charity.

From January 2010 to May 2013, Grievant solicited businesses for donations to help him build the race car. He would approach businesses and explain that he was trying to raise money to build a race car to promote the charity. He approached six companies that had truck fleets. He was responsible for inspecting and regulating the trucks in those fleets. He told each business whether they gave money would not alter

how he inspected their trucks. He received \$25,100 from six businesses. Grievant was responsible for regulating each of the six businesses.

Business S was one of the companies Grievant solicited for a donation. Grievant approached Business S wearing “sweats” and not wearing his uniform. Grievant told Business S’s owner that his business would not get any special consideration by donating money to Grievant’s charity. Business S’s owner knew that Grievant “did not cross the line.” Business S provided Grievant with a donation. Business S treated the donation as an advertising expense because Grievant placed a decal with Business S’s name on the race car.

Business N gave Grievant \$4,500 in cash. Business N told Grievant it wanted to remain anonymous. Grievant did not place a decal on the race car for Business N. Business N later told the Agency’s Investigator that it “did not want to give him a check because they thought it was a conflict of interest due to his employment as a trooper and they wished to be a silent or anonymous donor.”¹

Grievant operated the building of the race car as a sole proprietorship. One of Grievant’s donors was in the business of creating decals. Grievant asked this business to create decals for each of the businesses contributing to his race car venture. Grievant placed the decals on the body of the race car. Grievant included the funds he received from the businesses as gross revenue on his tax return. He also claimed depreciation and repair and maintenance on the race car. He maintained records showing the date and amount of each expense he incurred as part of his business. In 2011, he had a net loss of \$14,664. In 2012, he had a net loss of \$12,657. Grievant used his own funds to pay for many of the costs to build the car.

The Agency received a citizen complaint on August 28, 2013 alleging Grievant received money from Business S. The Agency investigated the matter and concluded disciplinary action was appropriate.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” General Order 12.02(12)(a). Group II offenses “include acts and behavior of a more severe and/or repetitive nature and are such that an additional Group II offense should normally warrant removal.” General Order 12.02(13)(a). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” General Order 12.02(14)(a).

General Order ADM 11.00 governs Standards of Conduct. Section 19 provides:

¹ Agency Exhibit 4.

Employees will neither solicit nor accept any gifts, gratuities, loans, or fees where there is any direct or indirect connection between the solicitation or acceptance and the performance of their duties.

“Failure to ... comply with applicable established written policy” is a Group II offense.² Grievant solicited gifts from at least six companies he was responsible for regulating. Grievant’s actions were connected to the performance of his duties because he created an actual or the appearance of a conflict of interest. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.

Grievant had prior active disciplinary action consisting of a Group II Written Notice. Upon the accumulation of two Group II Written Notices, an agency may terminate an employee or in lieu of termination, transfer, demote with a disciplinary pay reduction, and/or suspend an employee for up to 30 work days. Grievant has accumulated two Group II Written Notices. His transfer must be upheld.

Grievant asserted that he did not receive a gift but instead had sponsors. The essence of the transaction was one of making a gift. The companies giving Grievant money did so with little expectation of receiving any financial benefit in return. One company wished to remain anonymous because of the appearance of impropriety created by the transaction. Grievant did not place a decal or otherwise acknowledge the company in a manner to show that they received something of value in return for giving \$4,500.

Grievant did not use the donations he received for any purpose other than building the race car to benefit the veteran’s charity. His objective in soliciting money was not to benefit himself but to assist a charity he valued. No credible evidence was presented to show that Grievant altered his inspection schedule or results as a result of the donations he received. In other words, there is no reason for the Hearing Officer to believe that Grievant’s receipt of money from regulated companies affected his regulator activities with those companies.

Grievant created a conflict of interest or the appearance of a conflict of interest by soliciting money from regulated companies. Grievant held a position of power over motor carrier companies because he could determine whether their trucks could be operated on Virginia highways. Even though he may not have exercised that power for his personal benefit, the regulated companies could not be certain how Grievant would react if they rejected his requests. The fact that Grievant did not intend to receive a personal benefit from the money or impose a penalty on those refusing to give, does not alter the outcome of this case.

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

² General Order ADM 12.02(13(b)(1)).

“in accordance with rules established by the Department of Human Resource Management”³ 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 with transfer 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:

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

³ Va. Code § 2.2-3005.

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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.