

Issue: Group II Written Notice with Suspension (failure to follow policy); Hearing Date: 11/17/15; Decision Issued: 12/07/15; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 10692; 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: 10692

Hearing Date: November 17, 2015
Decision Issued: December 7, 2015

PROCEDURAL HISTORY

On July 16, 2015, Grievant was issued a Group II Written Notice of disciplinary action with a two work day suspension for violation of policy.

On July 16, 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 October 12, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 17, 2015, a hearing was held at the Agency's office.

APPEARANCES

Grievant
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 Virginia State Police employs Grievant as a Senior Trooper at one of its locations. He has been employed by the Agency for approximately 15 years. Grievant had prior active disciplinary action. He received a Group I Written Notice on March 18, 2015 for unsatisfactory work performance.

On May 14, 2015, Grievant was in his State Police vehicle wearing his uniform and a vest stating, "State Police". Grievant's vehicle was parked near a school where parents were dropping off their children and leaving. The Driver passed by Grievant. He made a fist, extended his middle finger, and gestured towards Grievant in order to insult Grievant. Grievant was understandably offended by the obnoxious Driver. Grievant activated his vehicle's police lights and caused the Driver to pull over to the side of a road near the school. Grievant approached the vehicle and said, "Why you want to disrespect me like that? The Driver said, "If you are pulling me over for anything other than a violation of the law - that is against the law." The Driver told Grievant he was being recorded and Grievant told the Driver he was also being recorded. The Driver claimed he was recording Grievant for his own protection. Grievant said the "Judge will find you guilty of disorderly conduct for flipping us off." The Driver said, "It's been ruled that that is not against the law. I have a freedom of speech." The Driver said Grievant was trying to embarrass him in front of his child's school. Grievant responded that the Driver did that himself. The Driver insisted he had not done anything wrong. The Driver asked if he was being detained and Grievant said, "No." The Driver then asked Grievant his name. Grievant told the Driver his name and offered the Driver his business card. Grievant said he was just going to give the Driver

a warning and ask why he disrespected Grievant. Grievant walked away and the Driver drove away. Grievant did not issue the Driver a summons or claim that the Driver was speeding. The Driver later complained to the Agency and the Agency began an investigation.

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 ADM 12.02(11)(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 ADM 12.02(12)(a). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” General Order ADM 12.02(13)(a).

“Inadequate or unsatisfactory job performance” is a Group I offense.¹ The Agency trains its Troopers that they must have a reasonable suspicion of an offense before stopping or detaining an individual. The Driver’s insulting gesture was not an offense under Virginia law. Grievant did not have a basis to stop the Driver. Grievant’s decision to stop the Driver was unsatisfactory to the Agency thereby justifying the issuance of a Group I Written Notice.

An agency may issue a Group II Written Notice (and suspend without pay for up to ten workdays) if the employee has an active Group I Written Notice for the same offense in his or her personnel file. Grievant had a prior active Group I Written Notice.² The Agency has presented sufficient evidence to elevate the Group I Written Notice in this case to a Group II Written Notice. Upon the issuance of a single active Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, Grievant’s two workday suspension must be upheld.

The Agency also took disciplinary action against Grievant because he asserted he stopped the Driver for speeding but failed to inform the Driver of that reason. The evidence showed that although the Driver may have been speeding at the time, Grievant’s sole reason for stopping the Driver was because of his obscene gesture. The Agency’s second allegation is unsubstantiated but does not affect the outcome of this case.³

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

¹ General Order ADM 12.02(12)(b)(4).

² See, Attachment A, DHRM Policy 1.60.

³ Grievant’s defenses to the second allegation become moot.

“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.

Grievant contends the disciplinary action should be mitigated because the Agency sometimes failed to follow Agency policies. He presented evidence showing that some employees were not following the Agency’s “mark on” policies. Employees were permitted to begin their shifts (“mark on”) only once they entered a county in which they were working. Some employees marked on before entering their work locations. Grievant was not disciplined for improperly beginning his shifts. Grievant did not show that the Agency failed to apply its requirements for stopping drivers. Grievant has not shown the inconsistent application of disciplinary action. 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 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:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

⁴ Va. Code § 2.2-3005.

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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.