



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11393

Hearing Date: October 2, 2019

Decision Issued: October 21, 2019

PROCEDURAL HISTORY

On March 19, 2019, Grievant was issued a Group I Written Notice of disciplinary action for using a State vehicle for personal reasons.

On April 20, 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 July 22, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 2, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
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. 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 Operations Manager II at one of its facilities. He has been employed by the Agency for approximately 17 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Agency learned that Grievant was driving a State vehicle to attend personal appointments and transporting his Wife to work. The Agency began an investigation. Grievant was honest and forthcoming throughout the investigation.

Grievant suffered a shoulder injury in November 2017 while moving a deer from the roadway. The injury occurred while he was performing his job duties. He worked with an injured shoulder until June 2018 when he had surgery to repair the damage to his shoulder. He began receiving physical therapy to improve his shoulder.

On July 25, 2018, Grievant was promoted and began working at Location 1. His work hours were from 7 a.m. to 3:30 p.m. His position was "designated as essential and must report during emergency inclement weather"¹ Beginning August 5, 2018, Grievant was allowed to use an Agency-issued vehicle during work hours and permitted to commute 55 miles between his home and Location 1.

The physical therapy provider's office was located "on the way home." Grievant scheduled his physical therapy appointments immediately after work. Rather than

¹ Agency Exhibit 4.

returning to his home and then go to his appointments, Grievant drove his Agency-issued vehicle from his office to his appointments and then to his home. Grievant believed that since the injury was work-related and the physical therapy provider's office was located on the way home, he was permitted to use his Agency-issued vehicle to attend the appointments.

Grievant worked at Location 1. Grievant's Wife was a VDOT employee who worked at Location 2. The Wife was designated as an essential VDOT employee during inclement weather.

During his first two weeks of working at Location 1, Grievant and his Wife "rode home together twice" in Grievant's Agency-issued vehicle.

In December 2018, approximately a foot of snow fell covering the localities where Grievant and his Wife worked. Grievant left Location 1 at approximately 10 p.m. and went to Location 2 to pick up his Wife. The Wife's car was buried in snow so Grievant and his Wife left their personal vehicle at Location 2 and the Wife rode with Grievant in the Agency-issued vehicle from Location 2 to their children's Grandmother's house. Grievant left his Agency-issued vehicle at the Grandmother's house and Grievant, his Wife, and children travelled in the Grandmother's vehicle to Grievant's home. The following day, they travelled back to the Grandmother's house and dropped off their children. Grievant and his Wife travelled in the Agency-issued vehicle from the Grandmother's house to Location 2. Grievant dropped off his Wife and travelled to Location 1. Grievant transported his Wife in the Agency-issued vehicle during a declared Agency emergency.

In January 2019, the Agency expected six inches of snow to fall in the area where Grievant and his Wife worked. Because his Wife was an essential Agency employee, Grievant wanted to make sure his Wife made it to work at Location 2. Grievant and his Wife travelled in the Agency-issued vehicle from their home to Location 2. Grievant then travelled from Location 2 to Location 1. After work hours, Grievant left Location 1 in his Agency-issued vehicle and travelled to Location 2 to pick up his Wife. They travelled to the Grandmother's house and left the Agency-issued vehicle there as Grievant and his family left the Grandmother's house to return to their home.

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."

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

“[U]nsatisfactory work performance” is a Group I offense.³ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Va. Code § 2.2-1178 requires that an employee’s use of an Agency-issued vehicle “shall be limited to official state business.”

DPM Number 1-16 governs Vehicle Assignment and Use Policy. Under this policy “Commuting” is defined as:

Use of state-owned, -rented, or –leased passenger-type vehicle or truck by an employee for travel between home and office, while not in “travel status.”

The policy provides:

Vehicles will be assigned only for the conduct of official state business and may not be assigned for the personal convenience of employees.

The Office of Fleet Management Services Policies and Procedures Manual provides:

Drivers shall use state-owned vehicles for official state business only. Drivers guilty of misuse are subject to disciplinary action by their agency and may lose their privilege to operate [a] state-owned vehicle. Vehicles are to be operated in a manner which avoids even the appearance of impropriety.

Family members of state employees are prohibited to ride in state-owned vehicles unless the family member’s travel is directly related to official state business.

Grievant used his Agency-issued vehicle contrary to policy. He and his Wife “rode home together” in August 2018. Grievant used his Agency-issued vehicle to travel from work to his physical therapy appointments. Although his injury arose because of work, his treatment was not official State business. Grievant transported his Wife to and from Location 2 in December 2018 and January 2019. Although she was an Agency employee and the travel occurred during inclement weather, the Wife was obligated to find her own means to report to work. Grievant was not obligated to transport his Wife to work. The Agency has presented sufficient evidence to support the issuance of a Group I 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 ...”⁴ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give

³ See Attachment A, DHRM Policy 1.60.

⁴ Va. Code § 2.2-3005.

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 notice⁵ 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.

The Agency had the discretion to reduce the disciplinary action to a counseling memorandum. Grievant offered numerous valid reasons for the Agency to reduce the disciplinary action. First, Grievant was honest and disclosed his personal use even though the Agency would not otherwise have been aware of some of his personal use. Second, Grievant stopped transporting his Wife to Location 2 in August 2018, because he recognized that it might not be appropriate. In other words, Grievant corrected his own behavior. Third, Grievant's Supervisor considered Grievant's trips to receive physical therapy to be permitted. Fourth, Grievant presented evidence showing that during inclement weather, Agency employees took extraordinary measures to ensure essential co-workers were present at work. The Hearing Officer's discretion is different from the Agency's discretion. Only if the disciplinary action exceeds the limits of reasonableness can the Hearing Officer reduce disciplinary action. In this case, the Group I Written Notice did not exceed the limits of reasonableness because it was consistent with the Standards of Conduct. 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 I Written Notice of disciplinary action is **upheld**.

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.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management

⁵ Grievant argued he did not have adequate notice of the Agency's policies. In July 2018, Grievant issued a notice of intent to take disciplinary action against an employee and he cited the same policies used by the Agency to support its Group I Written Notice against Grievant. Grievant had adequate notice of the Agency's policies governing use of Agency-issued vehicles.

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.