



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11408

Hearing Date: November 4, 2019
Decision Issued: November 21, 2019

PROCEDURAL HISTORY

On July 19, 2019, Grievant was issued a Group II Written Notice of disciplinary action with removal for unsatisfactory performance.

On July 19, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On August 12, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 4, 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 employed Grievant as a Transportation Operator II at one of its locations. He had been employed by the Agency for approximately 20 years.

Grievant had prior active disciplinary action. He received a Group I Written Notice on March 11, 2019 for unsatisfactory performance. On July 20, 2019, Grievant received a Group II Written Notice for unsatisfactory performance.

The Agency conducted mobile painting operations where the first truck was the paint truck, the second truck had cones on it, and the third truck served as a barrier between the oncoming traffic and the employee working in front of the third truck. The employee in front of the third truck, removed cones from the second truck and placed them on the road.

Grievant received training regarding how to set up a mobile painting operation.

Grievant was working a mobile painting operation. He was behind the second truck placing cones on the road. Grievant told the employee driving the third truck to wait at another area. The employee drove to another area to wait. This exposed Grievant to vehicles driving in his direction. The risk of injury to Grievant increased

significantly because he no longer had the third truck as a barrier between him and the oncoming traffic.¹

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.”

“[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.

Grievant instructed an employee driving the third truck in a mobile painting operation to go to another location. This increased the risk of harm to Grievant because the third truck was no longer protecting him as he removed cones from the second truck and placed them on the road. Grievant’s behavior was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support 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 has a prior active Group I Written Notice and Group II Written Notice for unsatisfactory work performance. Accordingly, the Agency may issue a Group II Written Notice.

Upon the accumulation of two active Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices. Accordingly, the Agency’s decision to remove Grievant must be upheld.

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

¹ The Agency presented other facts supporting its disciplinary action. It is unnecessary to address those facts since the Agency has presented sufficient evidence to support the disciplinary action based on the mobile painting operation.

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.

⁴ *Va. Code § 2.2-3005.*

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 presented testimony from a witness who observed employees improperly working without hard hats. Grievant asserted that the Agency managers did not hold a safety meeting on a daily basis. Grievant argued Agency managers were targeting him.

None of these arguments affect the outcome of this case. Grievant was not charged with failing to wear a hard hat. Grievant received training regarding mobile painting operations and had experience conducting these operations. Whether the Agency held safety meetings did not affect Grievant's knowledge of his need to have a third truck in place for safety. It is not unusual for an employee who managers think is performing poorly to believe he or she is being targeted by the manager. When an employee is performing poorly, managers often focus on that employee to monitor the employee's performance to ensure agency expectations are met. There is no evidence the Agency targeted Grievant because of any protected status. 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 is **upheld**. Grievant's removal is **upheld** based on the accumulation of disciplinary action.

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

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.