COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 12189

Hearing Date: November 20, 2024
Decision Issued: January 14, 2025

PROCEDURAL HISTORY

On September 4, 2024, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow a supervisor's instructions, willful misconduct, and safety/health violation.

On October 3, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 21, 2024, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 20, 2024, a hearing was held by virtual conference.

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. Grievant worked on a VDOT crew. Her duties included manual labor and operating equipment.

VDOT periodically provided training regarding how to operate a chainsaw. The training lasted approximately three to four hours and addressed how to properly and safely operate a chainsaw. A person completing the training was considered to be "VDOT certified." Grievant knew VDOT policy required employees to be certified to operate chainsaws, but she did not know of any policy requiring inmates to be certified by VDOT.

A local Jail provided inmates to VDOT to work at VDOT worksites for tree and debris removal. One of Grievant's duties included supervising inmates while they assisted VDOT work crews. Grievant was authorized to assign work duties to inmates and monitor their performance.

Inmate S was assigned to a VDOT work crew under Grievant's supervision. Inmate S was not certified by VDOT to operate a chainsaw. He was not certified by VDOT to work as a Flagger.[1]

[1] Flaggers were responsible for directing traffic flow around VDOT construction and worksites.

On August 12, 2024, Grievant escorted Inmate S to meet with Supervisor. Supervisor planned to conduct candidate interviews during the day. Grievant asked Supervisor if Inmate S could be certified as a flagger. Supervisor said he had an interview to do and could not certify Inmate S at that moment. Grievant asked Supervisor if Inmate S could operate, "run", a chainsaw. Supervisor asked Inmate S if he had been certified by VDOT to run a chainsaw. Inmate S said he had been certified back in 2022 while at another prison facility but did not have his card on him. Supervisor told Grievant and Inmate S that Inmate S could not run a chainsaw for VDOT unless certified by VDOT and that Inmate S could not run a chainsaw that day.

Grievant and Inmate S returned to the worksite. Grievant permitted Inmate S to operate a chainsaw as part of her work crew.

Supervisor learned that inmates were operating chainsaws without having been certified to do so. On August 22, 2024, Supervisor approached Grievant and mentioned to her about getting inmates certified to run chainsaws. He asked Grievant if she had witnessed any inmates running chainsaws in the last couple of weeks. Grievant said, "yes", and began naming inmates. She said the best inmate was the one who used to work for a tree company prior to getting locked up. Supervisor said he did not know which inmate Grievant was talking about. She described the inmate and said he was the one that morning that said he was not certified to do so when she brought him inside to ask Supervisor about getting him certified to flag. Supervisor asked Grievant if the inmate took it upon himself to run the chainsaw or what. Grievant said Inmate S told her he could run a chainsaw so she said to him, "show me what you got." Supervisor said he hoped the inmate had on all of his PPE (personal protective equipment). Grievant said "yes" and that "I won't allow them to run a chainsaw without it." Supervisor said he was assuming it was VDOT PPE and Grievant replied, "yes." Supervisor thanked Grievant and left.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "generally have a minor impact on agency business operations but still require intervention."[2] Group II offenses include, "acts of misconduct, violations of policy, or performance of a more serious nature that significantly impact the agency's services and operations." Group III offenses include, "acts of misconduct, violations of policy, or performance that is of a most serious nature and significantly impacts agency operations."

Insubordination can be a Group II or a Group III offense. Attachment A to DHRM Policy 1.60 defines insubordination as:

[2] DHRM Policy 1.60, Attachment A.

> Involves intentional defiance of supervisory authority; refusal to obey a reasonable and lawful order/directive, instruction or job duty as assigned by a manager or supervisor authorized to issue such directives. Management must demonstrate three criteria to prove insubordination: a) a supervisor or manager in the organization made a direct request/instruction; and b) the employee received and understood such directive(s); and c) the employee refused to comply with the requests through their verbal/written refusals or non-compliance. Refusals may not necessarily be directed to supervisors or managers and may be communicated via social media or to co-workers, customers or other stakeholders. NOTE: Privately and respectfully disagreeing with supervision/managers is a healthy difference of opinion and may benefit the organization. Furthermore, an employee's refusal to sign requested documents such as a policy receipt is not considered to be insubordination.

Grievant was insubordinate. Supervisor instructed Grievant to not allow Inmate S to operate a chainsaw. Grievant understood the Supervisor's directive. Grievant disregarded Supervisor's instruction and permitted Inmate S to operate a chainsaw without having required VDOT training.

Group III offenses include, "safety/health infractions that [endanger] the employee and/or others." Attachment A to DHRM Policy 1.60 provides, "Safety/Health violations include both the violation of safety policies created by an individual workplace and violations of the regulatory standards that are enforced within the Commonwealth of Virginia by the Virginia Occupational Safety and Health (VOSH)."

Chainsaws are inherently dangerous because they are designed to cut trees. An operator mishandling a chainsaw my harm the operator or others working nearby. VDOT's training and certification was intended to reduce the risk of injury from operating a chainsaw. Requiring inmates to be VDOT certified before using chainsaws was a safety rule.

Grievant violated an unwritten safety policy. Grievant was informed that inmates had to be VDOT certified before using a chainsaw. She allowed Inmate S to use a chainsaw contrary to the safety rule. Grievant's disregard of the safety policy endangered Inmate S and others working near him.

The Agency has presented sufficient evidence to support the issuance of a Group III offense because Grievant was insubordinate and she violated a safety rule that placed Grievant and others at risk of harm. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.

The Agency alleged Grievant permitted Inmate S to operate a chainsaw without all of the required personal protective equipment. This allegation has not been established. When Supervisor spoke with Grievant on August 22, 2024, Supervisor told Grievant, "I

hope he (Inmate S) had on all of his PPE." Grievant replied, "Yes." No evidence was presented contradicting this conclusion.

Grievant argued that when she took Inmate S to meet with Supervisor, she asked Supervisor if Inmate S could flag but did not discuss whether Inmate S could operate chainsaws. Indeed, Grievant contends no one ever told her inmates could not operate chainsaws. The Agency has presented sufficient evidence to support its assertion that Supervisor told Grievant and Inmate S not to operate a chainsaw. Supervisor's testimony was credible and confirmed by the notes he wrote on August 12, 2024. Mr. F also overheard the conversation and wrote a statement about what he overheard.

Grievant argued that inmates routinely operated chainsaws without having prior VDOT training and that VDOT did not have a policy prohibiting inmates from operating chainsaws. The evidence showed that prior to August 12, 2024, inmates routinely operated chainsaws without having VDOT certification. This practice changed on August 12, 2024 when Supervisor informed Grievant that VDOT certification for inmates was required. Grievant became aware of the new policy when she was instructed by Supervisor to not allow Inmate S to operate a chainsaw. Grievant was obligated to comply with that new safety requirement regardless of the Agency's past practice.

Grievant argued that she was not the only employee allowing inmates to operate chainsaws but the other employees were not disciplined. The evidence showed that a newly hired employee, Mr. B, operated a chainsaw without VDOT certification. Mr. B was removed from employment once Supervisor learned of Mr. B's actions. Supervisor testified he allowed inmates to operate chainsaws prior to August 12, 2024 because he did not know they lacked VDOT certification. After August 12, 2024, he stopped letting inmates use chainsaws because he knew they were not certified by VDOT to operate chainsaws.

Grievant argued that the Agency retaliated and discriminated against her. Grievant engaged in protective activity because she filed grievances. For example, on June 11, 2024, Grievant received a Group I Written Notice issued by the Maintenance Supervisor. She was disciplined for questioning the need for Bucket Truck training and her statement that she would not get into the bucket because she was afraid of heights. On July 20, 2024, Grievant filed a grievance to challenge the Group I Written Notice. The Second Step Respondent removed the disciplinary action but concluded Grievant should receive a written counseling for her behavior. On July 14, 2024, Grievant filed a grievance claiming she was treated unfairly and her supervisor raised his voice. The Second Step Respondent denied Grievant's request for relief. Grievant suffered an adverse employment action because she was disciplined and removed from employment by the September 4, 2024 Group III Written Notice. Grievant has not established a nexus between her protected activity and the adverse employment action she received. It appears that the Agency's decision to discipline and remove Grievant was based on the severity of her behavior. In addition, Grievant did not establish that the Agency discriminated against her because of a protected class.

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 …."[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 III Written Notice of disciplinary action with removal 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
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

[3] Va. Code § 2.2-3005.

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].

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Carl Wilson Schmidt, Esq.
Hearing Officer

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