



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11860

Hearing Date: November 22, 2022
Decision Issued: December 9, 2022

PROCEDURAL HISTORY

On June 1, 2022, Grievant was issued a Group III Written Notice of disciplinary action with removal for unauthorized use of State property and theft.

On June 23, 2022, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On July 18, 2022, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 22, 2022, a hearing was held by remote 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. He had been employed by the Agency for approximately 18 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was often assigned a Dump Truck to take stone from the Area Headquarters and use it in Agency road projects. If he had stone left over, he was to return the stone to the Area Headquarters so that it could be used in other Agency projects.

On March 16, 2022, Grievant was operating a Dump Truck filled with stone. He did not use all of the load on his work project. He returned the Dump Truck and stone to the Area Headquarters.

On March 17, 2022, Grievant again was responsible for operating the Dump Truck with a partial load of stone. The load was approximately three tons of stone valued at approximately \$100.

Grievant was sent to repair a damaged mailbox. Instead of going directly to the location of the mailbox, Grievant drove the Dump Truck from the Area Headquarters to a house owned by his son. Grievant dumped the load on his son's property in the driveway. He was at his son's property from 8:16 a.m. until 8:29 a.m. Grievant's son's property was not a maintenance or construction site for VDOT work.

Someone submitted a complaint to the State Fraud, Waste, and Abuse Hotline. On March 22, 2022, Grievant was notified of the hotline complaint and that it would be investigated. On March 31, 2022, Grievant met with an Investigator. Grievant told the Supervisor and Superintendent that he dumped the Agency's stone on the property that was owned by his son.

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."¹ 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."

VDOT AMD Policy 1.02 governs Disposal of Materials. This policy provides:

VDOT employees may not take possession, use, sell or dispose of state-owned materials of any kind for personal gain. ***

Violation of this directive will subject the employee to the Standards of Conduct.²

Theft is unethical conduct constituting a Group III offense.³ Grievant was authorized to use the Agency's Dump Truck for business purposes only. He was obligated to use the stone for Agency projects. On March 17, 2022, Grievant took the Agency's Dump Truck containing stone belonging to the Agency and dumped the stone on the driveway of his son's property. Grievant was not authorized to use the Dump Truck to drive to his son's property and was not authorized to dump stone on that private property. There was no business need to dump stone at the son's property. Grievant knowingly took Agency property and used it for a private purpose. Grievant's action constituted theft of the Agency's property. The Agency has presented sufficient evidence to support the

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² Agency Exhibit p. 74.

³ See, Attachment A, DHRM Policy 1.60. DHRM Policy 1.60 provides, "Unethical or illegal conduct may include but is not limited to theft"

issuance of a Group III Written Notice. 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.

Grievant argued that he had been advised that if an operator had a little stone left in the Dump Truck it was ok to take that stone. Grievant asserted he told his Supervisor that he was not going to bring any stone back to the Area Headquarters. No credible evidence was presented to establish this allegation.

Grievant argued that he dumped the stone on March 18, 2022 and not on March 17, 2022. If the Hearing Officer assumes for the sake of argument that the stone was dumped on March 18, 2022, the outcome of this case does not change. Grievant took stone belonging to the Agency and dumped it on his son's property. His behavior was an offense under the Standards of Conduct regardless of which day he engaged in the behavior.

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 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.

The Agency valued the stone at approximately \$100. The Agency could have considered the value of the stone in order to mitigate the disciplinary action. The Agency chose not to do so. The value of the stone is not a reason for the Hearing Officer to conclude that the disciplinary action exceeds the limits of reasonableness. 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 III Written Notice of disciplinary action with removal is **upheld**.

⁴ *Va. Code § 2.2-3005.*

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.