

Issues: Group II Written Notice (misuse of State property), and Group III Written Notice with Termination (falsifying records); Hearing Date: 07/02/18; Decision Issued: 09/07/18; Agency: VDOT; AHO: James M. Mansfield, Esq.; Case No. 11203; Outcome: No Relief - Agency Upheld; **Administrative Review Request received 09/23/18; EDR Ruling No. 2019-4784 issued 12/20/18; Outcome: AHO's decision affirmed.**

**COMMONWEALTH OF VIRGINIA**  
**DEPARTMENT OF HUMAN RESOURCE MANAGEMENT**  
**OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In the matter of: Grievance Case No. 11203

Hearing Date: July 2, 2018  
Decision Issued: September 7, 2018

**PROCEDURAL HISTORY**

Grievant was a Construction Manager for the Commonwealth of Virginia Department of Transportation ("Agency"). On March 3, 2018 Grievant was issued a Group II Written Notice for misuse of State equipment in violation of Department of Human Resource Management Policy 1.60 and Agency Regulation 1.16. (Agency Exhibit No. 2). Additionally, Grievant was issued a Group III Written Notice for abuse of State time and falsification of time records in violation of Department of Human Resource Management Policy 1.60 and Policy 1.25 which terminated Grievant's employment with the Agency. (Agency Exhibit No. 3).

On April 3, 2018, Grievant challenged the Agency's action terminating employment by timely filing a Dismissal Grievance. This Hearing Officer was appointed and a pre-hearing conference was scheduled and held in the matter on May 6, 2018. Both Parties were represented by Counsel and by agreement a hearing in the matter was scheduled for June 21, 2018. Subsequently, based on the unavailability of material witnesses, the Agency moved for a continuance. A second telephone conference with Counsel was held on June 4, 2018, at the conclusion of which, for good cause shown, the Hearing in the matter was continued to July 2, 2018. The Hearing was held on that date.

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constitutes misconduct?
3. Whether the Agency's discipline was consistent with law and policy, and was properly characterized as a Group II and Group III offenses subject of termination?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action?

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; and evidence that is more convincing than the opposing evidence.

Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to any disciplinary action by the Agency.

## **HEARING**

The following appeared at Hearing held as scheduled at the Agency's Facility on July 2, 2018 as scheduled (several witnesses testified by telephone). The Hearing was duly recorded:

Grievant  
Grievant's Counsel  
Witnesses Subpoenaed on behalf of Grievant  
Agency Designee  
Agency Attorney  
Witnesses called on behalf of the Agency  
Hearing Officer

The Hearing was duly recorded. The Parties exhibits were received and admitted.

## **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor and credibility of each of the witnesses, the Hearing Officer makes the following findings of fact:

1. On March 3, 2018 Grievant was issued a Group II Written Notice and a Group III Written Notice for violations of Agency Policies. (Agency Exhibit Nos. 2 and 3). As a result, Grievant was terminated from employment with the Agency.

2. Grievant had use of a State vehicle for use to and from State projects.

3. The vehicle had a GPS tracking monitor.

4. The evidence introduced by the Agency proved by a preponderance of the evidence that on multiple occasions, Grievant used the State vehicle for personal use unrelated to State business. (Agency Exhibit No. 22).

5. The Agency also produced sufficient evidence regarding Grievant's computer logon time to support its claim that Grievant had falsify hours work. (Agency Exhibit Nos. 17, 22, 23 and

24).

6. While witnesses called on behalf of the Grievant testified that the use of state vehicles was lax, Grievant's use of the State vehicle were clearly sojourns and not related to work assignments.

7. Agency's Standard of Conduct provides that Employees must "[c]omply with the letter and spirit of all state and agency policies and procedures . . ." (Agency Exhibit No. 8).

8. Evidence introduced by the Agency was that it considered mitigating the disciplinary action including: the Grievant's length of service, levels and style of oversight, and inherent challenges of the position, but, due to the severity of the violation, termination was warranted. (Agency Exhibit Nos. 2 and 3).

### CONCLUSIONS OF POLICY

Pursuant to the Agency's Policy Resolution 1.60: 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." 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."

### DECISION

For the reasons stated above, based upon consideration of all the evidence presented in this cause, the testimony of the witnesses and the Exhibits received into evidence, the Hearing Officer finds that the Agency's issuance to the Grievant of a Group II and a Group III Written Notice of disciplinary action and termination 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 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401 or e-mail [dhm@dhm.virginia.gov](mailto:dhm@dhm.virginia.gov).

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 14<sup>th</sup> Street, 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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 days 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.

[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/ James M. Mansfield  
James M. Mansfield