

Issue: Group I Written Notice (abuse of State time); Hearing Date: 05/09/19;  
Decision Issued: 05/29/19; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 11317; Outcome: Full Relief; **Administrative Review Request received  
06/13/19; EDR Ruling No. 2019-4947 issued 07/12/19; Outcome: AHO's decision  
affirmed.**



# **COMMONWEALTH of VIRGINIA**

*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

## **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11317**

Hearing Date: May 9, 2019  
Decision Issued: May 29, 2019

### **PROCEDURAL HISTORY**

On August 10, 2018, Grievant was issued a Group I Written Notice of disciplinary action for abuse of State time.

On September 17, 2018, 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 February 25, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 9, 2019, a hearing was held at the Agency's office.

### **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency's 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 Operator II at one of its facilities. He has been employed by the Agency for approximately 11 years. No evidence of prior active disciplinary action was introduced during the hearing.

The Crew Leader's work shift was from approximately 7 a.m. to 3:30 p.m.

On May 22, 2018, the Crew Leader, Mr. H, and Grievant were assigned responsibility for road maintenance along several highways near the Agency's headquarters. The Crew Leader drove the State vehicle. Grievant sat in the front seat of the vehicle. Mr. H sat in the back seat. They performed their work duties on various highways until they came to a sinkhole to the side of a highway.

The Crew Leader was the supervisor with respect to the work to be performed on May 22, 2018. He was a Transportation Operator III. He could not hire or terminate employees. He directed where the crew would go and what tasks they would perform at each job site. He could assign crew members to work trucks. He could determine when the crew took a lunch break or other breaks. The Agency expected Grievant to follow the instructions of the Crew Leader while working on the crew. Grievant understood he was supposed to follow the instructions of the Crew Leader.

Mr. H's wife worked at a Department of Corrections Facility. At some point, she called and spoke with Mr. H. At approximately 11:20 a.m., Mr. H approached the Crew Leader and Grievant and said there was an emergency and he needed to go to the DOC Facility. He asked the Crew Leader if they could drive to the DOC Facility since they were close to the DOC Facility. The Crew Leader wanted to help Mr. H address an emergency so he decided they would drive to the DOC Facility.<sup>1</sup> Grievant did not state he objected to the Crew Leader's decision.

The three men travelled approximately three or four miles to the DOC Facility. The DOC Facility included meat packing equipment. The trip took between eight and ten minutes. They arrived at approximately 11:30 a.m. They exited the State vehicle. Mr. H met his wife and gave her money. Grievant began eating his lunch but did not finish. He considered the stop to be his lunch break. Mr. H's wife offered to give the three men a tour of a portion of the facility. The three men walked down a hallway, looked at several machines and the food product made by those machines. The tour took approximately 15 minutes. They returned to the State vehicle and drove to the sinkhole area. The men left the sinkhole, went to the DOC Facility, and returned to the sinkhole in approximately 30 to 35 minutes.

The Crew Leader drove the State vehicle to another job site. The trip took approximately 15 minutes. They observed another crew at the job site finishing up work. The Crew Leader, Grievant, and Mr. H remained at the job site for approximately five minutes.

The Crew Leader decided he wanted to take a lunch break. He "spoke up" and said he wanted to go to Burger King because "I like Burger King." He drove the State vehicle to the Burger King. The Crew Leader and Mr. H went inside Burger King. Grievant remained with the State vehicle. He left the State vehicle and went inside a local Grocery Store to use the restroom. Grievant returned to the State vehicle. He waited for the two other men to finish their lunches.<sup>2</sup> He ate the rest of his sandwich that he started eating when he was at the DOC Facility. Once the Crew Leader and Mr. H returned to the State vehicle, they travelled to other job sites and ultimately returned to the headquarters to end their shifts.

The Agency issued the Crew Leader and Mr. H Group I Written Notices.

## CONCLUSIONS OF POLICY

---

<sup>1</sup> The Crew Leader testified, "I made the decision on my own."

<sup>2</sup> Grievant may have entered the Burger King to purchase a milkshake, but the evidence is not clear whether he did so on that day or another day. The Hearing Officer considers the amount of time to purchase a milkshake to be *de minimis*.

The Agency alleged that Grievant abused State time by taking two lunch breaks on May 22, 2018. Grievant was permitted to take a 30 minute lunch break during one of two time periods at issue. He was not permitted to take more than one lunch break. The first time period which could have been an abuse of State time occurred when the three men left the sinkhole to go to the DOC facility. The first time period ended when the crew resumed its route from the sinkhole to the worksite where the other crew was working. The second time period began when the crew left the other crew's worksite and began driving to the Burger King. The second time period ended when the crew left Burger King to resume working.

In order to support its disciplinary action in this case, the Agency must establish that Grievant was at fault. In other words, the Agency must establish that Grievant took an action that he should not have taken or failed to take an action he should have taken.

The Agency has established that the Crew Leader was at fault for numerous reasons. Grievant is not responsible for the poor decisions made by the Crew Leader. Grievant was not responsible for any statements Mr. H made to the Crew Leader.

The Crew Leader was at fault for leaving the sinkhole location and driving to the DOC Facility without first obtaining permission from a manager. Grievant heard Mr. H claim his wife had an emergency, but Grievant was not involved in making the decision to go to the DOC Facility. The Crew Leader decided the three men would go to the DOC Facility. Grievant followed the Crew Leader's directive. Grievant was not obligated to protest the Crew Leader's decision. Grievant knew the Crew Leader had the authority to determine where the crew travelled. Grievant would "snack" throughout the day and he considered the trip to the DOC Facility to be his lunch break. He began eating his sandwich at the DOC Facility.

An Agency witness suggested Grievant could have asked to remain on the side of the road at the sinkhole. The evidence showed that if he had remained on the side of the road near the sinkhole, he could have been in danger from vehicle traffic. Also, it is not clear what work he could have done while the two other men were away from the sinkhole.<sup>3</sup> Grievant did not abuse State time by leaving the sinkhole and travelling to the DOC Facility.

At the DOC Facility, Mr. H spoke with his wife. Grievant was not performing work duties while Mr. H spoke with Mr. H's wife. Grievant was not at fault for being unable to perform work duties while Mr. H spoke with Mr. H's wife.

Mr. H's wife offered to give the three men a tour of the DOC meat packing facility. It is unclear who accepted the offer but all three men entered the meat packing facility. The tour lasted only a few minutes and consisted of walking down a hallway and viewing equipment. No credible evidence was presented showing Grievant agreed to

---

<sup>3</sup> A manager had viewed the sinkhole on another day and concluded work was not yet necessary to repair the sinkhole.

the tour despite the wishes of the other two men. The Agency has not established that Grievant was responsible for delaying the departure from the DOC Facility in order to take the tour.

The Agency argued that Grievant could have remained with the State vehicle instead of taking the tour. If Grievant had remained with the State vehicle, Grievant most likely would have sat in the State vehicle without doing any productive work. With respect to how Grievant used his time, it did not matter whether he took the tour or remained in the State vehicle. In either case, his time was not productive work. The Agency has not shown that Grievant abuse State time by taking a tour of the DOC meat packing facility.

When the men travelled from the DOC Facility back towards the sinkhole, their time as not productive. The reason for this non-productive time was because of the Crew Leader's initial decision to leave the sinkhole and go to the DOC Facility.

When the three men were at the other worksite, they were performing work duties by speaking with the work crew at the other worksite.

When the three men left the other worksite to travel to Burger King, their time was not work-related time. The Crew Leader was responsible for beginning this non-productive time. Grievant was not at fault for the three men ending their work duties to go to the Burger King. Grievant was not obligated to protest the Crew Leader's decision to go to the Burger King.

While the Crew Leader and Mr. H went into the Burger King, Grievant went to a grocery store to use the restroom and remained in the State vehicle.<sup>4</sup>

The Agency has not established Grievant was at fault for taking two lunch breaks. The decision to take the second lunch break was made by the Crew Leader and Grievant followed the Crew Leader's decision.<sup>5</sup> The disciplinary action must be reversed.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

---

<sup>4</sup> The Crew Leader testified Grievant may have entered the Burger King to get a drink. The outcome of this case is the same regardless of whether or not Grievant entered the restaurant.

<sup>5</sup> The Agency did not charge Grievant for failing to request leave for that day.

## 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 14<sup>th</sup> St., 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 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.<sup>[1]</sup>

[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

---

<sup>[1]</sup> Agencies must request and receive prior approval from EEDR before filing a notice of appeal.