

Issue: Group III Written Notice with Termination (stealing State property);  
Hearing Date: March 7, 2002; Decision Date: March 8, 2002; Agency:  
Department of Transportation; AHO: David J. Latham, Esquire; Case Number:  
5387; **Judicial Review: Appealed to the Circuit Court in the County of  
Henrico on 04/18/02; Outcome: HO decision affirmed. Not contradictory to  
law (Case No. CL02-663) dated 09/30/02**



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 5387

Hearing Date: March 7, 2002  
Decision Issued: March 8, 2002

**PROCEDURAL ISSUE**

The grievant failed to submit any documents or a witness list prior to the hearing. Grievant failed to appear at the hearing on the docketed date. The hearing officer called his residence and was advised by the person answering the telephone that grievant was working for a new employer, was at work, and did not plan to attend the hearing. The hearing officer conducted the hearing and took evidence from those who appeared.

**APPEARANCES**

Resident Engineer  
Legal Assistant Advocate for Agency  
Three witnesses for Agency

## ISSUES

Did the grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

## FINDINGS OF FACT

The grievant filed a timely appeal from a Group III Written Notice issued on November 7, 2001 because he stole state property.<sup>1</sup> As part of the disciplinary action, the grievant was discharged from employment.<sup>2</sup> Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.

The Virginia Department of Transportation (VDOT) (hereinafter referred to as "agency") has employed grievant as a maintenance crew member for 3 years.

Crew members who are assigned to patch potholes utilize trucks that are equipped with propane heaters which maintain asphalt temperature at a level that prevents it from hardening. Employees are told to take only as much asphalt as will be needed for the day's patching activities. If employees have excess asphalt at the end of the workday, they are told to, a) use small amounts to patch holes or low shoulders or, b) bring the excess back to the yard for reuse the following day.<sup>3</sup> If the excess cannot be used, it is dumped at the VDOT yard and later taken to a landfill for disposal.

Agency policy provides that crew members may work only inside the boundaries of their residency. In this case, grievant was limited to working within the eastern portion of the county where the residency is located. Crew members may not drive state vehicles outside the residency boundaries, unless authorized by supervision for a specific job assignment.

Sometime during May or June 2001, grievant was working alone patching potholes near the intersection of two interstate highways. When he finished patching, he had a significant amount of asphalt left in his truck. He drove 12 miles to another county and went to the residence of a coworker. Grievant then put all of the asphalt on the driveway of the coworker's residence in three separate areas.<sup>4</sup> Grievant worked alone and apparently hand-raked the asphalt. Based on the square footage and depth of the blacktop, the resident engineer

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<sup>1</sup> Exhibit 11. *Grievance Form A*, filed November 20, 2001.

<sup>2</sup> Exhibit 4. Written Notice, issued November 7, 2001.

<sup>3</sup> Exhibit 6. Letter from superintendent to resident engineer, December 20, 2001. Electric heaters in the truck are utilized to keep the asphalt warm overnight.

<sup>4</sup> Exhibit 1. Color photographs showing areas of the driveway covered with new asphalt. The largest of the three areas is about 15 x 30 feet.

calculated that between one and three tons of asphalt was placed on the driveway.

The employee whose driveway was paved had performed repair work on grievant's automobile. Grievant contends that he had paid for the repairs in cash and denied that the asphalt was a quid pro quo for the automobile repair work.<sup>5</sup>

A citizen filed a complaint with the agency in October 2001. The citizen had seen the VDOT truck and grievant working on the driveway.<sup>6</sup> It is unknown why there was a four-month delay in reporting the incident.<sup>7</sup>

### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>8</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the

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<sup>5</sup> Exhibit 2. Interview notes of resident engineer, October 24, 2001.

<sup>6</sup> Exhibit 13. Report of Virginia State Police investigator, October 30, 2001.

<sup>7</sup> The citizen was killed in an accident two weeks before State Police began their investigation.

<sup>8</sup> § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.

Code of Virginia, the Department of Personnel and Training<sup>9</sup> promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual Standards of Conduct Policy No. 1.60* provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. One example of a Group III offense is theft or unauthorized removal of state property.<sup>10</sup>

A preponderance of the evidence, as well as grievant's admission, establishes that he appropriated a substantial quantity of state property to pave a portion of the driveway of a coworker who had performed repair work on grievant's automobile. This act constitutes theft or unauthorized removal of state property – a Group III offense.

Grievant initially contended he had put no more than 3-4 wheelbarrows of asphalt on the driveway. When later questioned by State Police, grievant acknowledged that he used more than one ton of asphalt. Grievant's credibility is tainted by his attempt to minimize the extent of his theft. Grievant's credibility had already been called into question in June 2001 when he falsified his arrival time at work on a sign-in sheet.<sup>11</sup>

Grievant contended that his supervisor had told him, "not to bring excess asphalt back to the yard or leave it on the side of the road."<sup>12</sup> The superintendent who instructed grievant to use the material for road or shoulder patching, or return the excess to the VDOT yard contradicted this assertion.<sup>13</sup> A crew member verified the superintendent's instructions.

In his grievance, the grievant contends that the superintendent is prejudiced against him. This contention flies in the face of logic for two reasons. First, when he applied for employment with the agency, grievant listed the superintendent's name as a personal reference.<sup>14</sup> Second, the superintendent had evaluated grievant's performance as meeting or exceeding all expectations.<sup>15</sup> Given grievant's listing of the superintendent as a personal reference and the superintendent's favorable performance evaluation of grievant, it is illogical that the superintendent would be prejudiced against grievant. In any

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<sup>9</sup> Now known as the Department of Human Resource Management (DHRM).

<sup>10</sup> Exhibit 12. Section V.B.3.d, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.

<sup>11</sup> Exhibit 10. Memorandum to grievant from assistant resident engineer, June 11, 2001.

<sup>12</sup> Exhibit 14. Letter submitted to agency by grievant on November 8, 2001.

<sup>13</sup> Exhibit 6. Letter to resident engineer from superintendent, December 20, 2001.

<sup>14</sup> Exhibit 7. Grievant's *Application for Employment*, March 9, 1998.

<sup>15</sup> Exhibit 9. *Personal Effectiveness Review* of grievant, October 16, 2000.

case, this is a red herring because grievant has admitted that he stole the asphalt and placed it in the driveway of another state employee.

Grievant failed to appear for the hearing or to submit any evidence on his own behalf. Other than the above contentions, which have been successfully rebutted by the agency, grievant failed to present any testimony or evidence to explain or mitigate his offense.

### DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued to the grievant on November 7 and his discharge from employment are AFFIRMED. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

### APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the

decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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David J. Latham, Esq.  
Hearing Officer