

Issue: Group III Written Notice with termination (misuse of State funds and failure to follow fiscal guidelines); Hearing Date: 08/19/03; Decision Issued: 08/22/03; Agency: Dept. of Forestry; AHO: Carl Wilson Schmidt, Esq.; Case No. 5779; **Administrative Review: DHRM Ruling Request received 08/29/03; DHRM Ruling issued 09/29/03; Outcome: HO's decision comports with provisions of DHRM Policy 1.60. No reason to interfere with decision; Judicial Review: Appealed to the Circuit Court in Franklin County on 10/28/03; Outcome: Decision of HO is not contradictory to law [Case No. 03-04-8756] (03/17/04).**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5779**

Hearing Date: August 19, 2003  
Decision Issued: August 22, 2003

**PROCEDURAL HISTORY**

On May 1, 2003, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

*Misuse of state money and failure to follow DOE's fiscal procedures & guidelines regarding handling monies received from debtors of the State. Employee failed to receipt money received from a debt owed by a citizen. In addition, he cashed a check solicited by him. Once approached and questioned by supervisor, employee submitted payment in full 4 (four) days later by personal check.*

On May 29, 2003, 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 July 23, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 19, 2003, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant

Grievant's Counsel  
Agency Party Designee  
Agency's Counsel  
Seven Witnesses

## **ISSUE**

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

## **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. 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 Forestry employed Grievant as a Chief Forest Warden until his removal on May 1, 2003. He had been employed by the Department for approximately 11 years. Grievant had no prior active disciplinary action.

On March 12, 2003, the Landowner was burning leaves on his property. He attempted to suppress the fire and believed he had done so. On March 14, 2003, a spark ignited a fire in nearby woods. Firefighters came to the Landowner's property and put out the fire. Because the Landowner failed to properly suppress the initial fire, Grievant issued the Landowner a citation for which the Landowner sent payment to a local court.<sup>1</sup> The Landowner was also obligated to pay for the cost of having the firefighters put out the fire. Grievant informed the Landowner that Grievant would have to calculate the fire suppression costs and then let the Landowner know the amount due. Grievant's said he would call the Landowner on Sunday, March 16, 2003. The Landowner asked Grievant how his check should be made payable. Grievant told the Landowner to make check payable either to Virginia Forestry or to Grievant. Grievant provided the Landowner with his business card and then left.

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<sup>1</sup> Grievant paid approximately \$85 as a fine and court costs.

On March 16, 2003, Grievant did not call the Landowner. Later, the Landowner called Grievant and ask Grievant if he knew the amount of the fire suppression cost. Again, the Landowner asked Grievant how to make his check payable. Grievant told the Landowner to make the check payable to Grievant. On March 27, 2003, Grievant spoke with the Landowner a third time by telephone and told the Landowner to make the check payable to Grievant.

Grievant submitted a Wildfire Incident Report to the Agency's Regional Office on March 17, 2003. The report showed that the Landowner owed \$261.63 based on Grievant's calculations. Grievant had incorrectly calculated the amount due. He underestimated the cost by \$6. The correct amount due should have been \$267.63. Regional Office staff notice the error and made a correction on the report. On March 27, 2003, the Program Support Tech drafted<sup>2</sup> a form letter to the Landowner stating that the Landowner owed \$267.63.

On March 28, 2003, the Landowner wrote a personal check in the amount of \$261.63 made payable to Grievant. In the memo portion of the check, the Landowner wrote "Va. Forestry Service" and the Virginia Code section which he violated. He filled in the memo section of the check as he did because he thought it was unusual that Grievant would ask that a check be made payable to a person rather than to the State. The Landowner mailed the check to the post office box indicated on Grievant's business card. At the time the Landowner mailed his check to Grievant, the Landowner had not received the form letter from the Program Support Tech. Once the Landowner received the form letter, he noticed that it sought payment for \$267.63 (instead of \$261.63) and did not reflect a credit for the check he had sent to Grievant. On April 1, 2003, the Landowner called the Regional Office staff expressing concern as to his liability for the additional \$6 and to ask whether his balance due would be credited by the amount of the check he wrote to Grievant.

Grievant received the Landowner's check on March 31, 2003. On Tuesday, April 1, 2003 at approximately 9:11 a.m., Grievant took the check to his bank, endorsed the back of the check, and presented it to the bank teller. He received cash in the amount of \$261.63. Grievant's actions were verified by a video camera in the bank. On April 1, 2003, the Regional Forester asked Grievant if he had received a check from the Landowner. Grievant said he had not received the check but that the Landowner would send payment.

On April 3, 2003, the Regional Forester again asked Grievant if he had received the check from the Landowner. Even though Grievant had cashed the check two days earlier, Grievant told the Regional Forester that he had received the check, placed it in his briefcase, and misplaced his briefcase.

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<sup>2</sup> The Program Support Tech drafted the letter and signed Grievant's name to it.

On Friday, April 4, 2003, Grievant drove<sup>3</sup> to the Regional Office and wrote a personal check in the amount of \$267.63 to the State Forester to reimburse the Commonwealth for the money he received from the Landowner.

### CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force.” DHRM § 1.60(V)(B).<sup>4</sup> Group II offenses “include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal.” DHRM § 1.60(V)(B)(2). Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

DHRM § 1.60(V) lists numerous examples of offenses. These examples “are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section.” It is the Agency’s judgment that an employee who solicited personal payment of funds intended for the Commonwealth and who then held those funds without taking immediate action to transfer those funds to the Commonwealth should receive a Group III Written Notice and be removed from employment. The Hearing Officer agrees.<sup>5</sup> Grievant had law enforcement responsibilities. He was aware of the Agency’s longstanding policy requiring checks for suppression costs to be written to the Agency and not an individual. His actions as an Agency employee created a negative impression with a member of the public. He mishandled funds rightfully belonging to the Commonwealth and returned money to the Commonwealth only after questions had been raised about his receiving a check from the Landowner. The Agency has established sufficient evidence to support its issuance of a Group III Written Notice with removal.

Grievant contends he did not tell the Landowner to make the check payable to Grievant. The Landowner’s testimony was credible. Grievant and the Landowner did not know one another prior to their first meeting on March 14, 2003. When an Agency manager asked Grievant about the Landowner, Grievant expressed words to the effect

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<sup>3</sup> While at the Regional Office, Grievant pick up 1000 white pine trees for delivery elsewhere.

<sup>4</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>5</sup> The Agency contends Grievant solicited the funds in order to improve his “cash flow” position. Although it is unnecessary for the Agency to establish Grievant’s motive, the low balances shown in Grievant’s bank records suggest cash flow may have been a concern of his.

that the Landowner was a “good guy” and would pay the cost of fire suppression. Grievant contends the Landowner was angered because he received a citation and had to reimburse the cost of fire suppression. Although the Landowner clearly did not like receiving a ticket and paying the cost of fire suppression, no evidence was presented suggesting the Landowner’s anger was directed at Grievant personally as opposed to being directed at the Department or the Commonwealth. No evidence was presented suggesting the Landowner complained about Grievant specifically because of any actions taken by Grievant. Grievant was acting in his capacity as a representative of the Department. If the Landowner wished to seek revenge, his actions would have been directed at the Department and not at Grievant.

Grievant’s actions were consistent with those of someone who had asked that a check be written to him personally. Grievant testified adamantly that he knew it was wrong for a citizen to write a check to an Agency employee instead of to the Department. Grievant did not seek guidance from anyone in the Agency regarding what he should do with the check once he received it. Instead, he went to his bank and received cash for the check. When repeatedly asked by Agency managers about the status of the check, Grievant responded that he did not know. He suggested that he did not realize he had taken the check to his bank because his girlfriend frequently did his banking and he believed she cashed the check. Grievant’s own bank records, however, show that he had only one check transaction on April 1, 2003 when he went to the bank. It is unlikely that Grievant failed to remember<sup>6</sup> making a special trip to the bank during work hours to cash a check which Grievant knew was incorrectly written to him.

Grievant argues he intended to transfer the money to the Agency on April 1, 2003 rather than waiting until April 4<sup>th</sup>. Several employees testified that Grievant had spoken to them about coming to the Regional Office to have repairs made to his vehicle and to pick up trees. No one, however, testified that Grievant informed them he intended to give the Agency money he received from a citizen.

Grievant contends the Agency’s disciplinary action against him should be mitigated to a lesser discipline short of removal.<sup>7</sup> Grievant has had “a longstanding history of anxiety, depression and panic attacks for several years.”<sup>8</sup> Grievant suffered from anxiety, depression, and panic attacks due to difficulties he was encountering in his life. Although the unfortunate emotional trauma Grievant experienced was real and affected him, the Hearing Officer does not believe the trauma was so severe as to

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<sup>6</sup> Grievant testified that the Regional Forester called him and asked about the Landowner’s check before Grievant went to the bank to cash the check. If this is true, then the Regional Forester’s call should have drawn such attention to the Landowner’s check that Grievant could not have forgotten or realized that he had cashed the Landowner’s check.

<sup>7</sup> Corrective action may be reduced based on mitigating circumstances. Mitigating circumstances include: (1) conditions related to an offense that justify a reduction of corrective action in the interest of fairness and objectivity, and (2) consideration of an employee’s long service with a history of otherwise satisfactory work performance.

<sup>8</sup> Grievant Exhibit 3.

prevent Grievant from immediately and fully disclosing what happened when Agency managers asked him specific questions. For example, when the Agency Investigator spoke with Grievant on April 22, 2003 and asked what happened to the check, Grievant stated that his girlfriend had cashed the check on Monday, March 31, 2003 and placed the money in his briefcase. When Grievant gave this answer, he knew the answer was untrue because he had confirmed with his bank manager that he had gone to the bank to cash the check. On April 23, 2003, the Investigator informed Grievant that the Agency could prove without question the truth about the check and that the Investigator was giving Grievant a last chance to tell the truth. Grievant knowingly falsely informed the Investigator that Grievant's girlfriend cashed the check.

## 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 file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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.<sup>9</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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>9</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.