

Issue: Group III Written Notice with suspension (abusing State resources and falsifying records); Hearing Date: 11/03/05; Decision Issued: 11/09/05; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8191; Outcome: Employee granted partial relief; **Administrative Review: HO Reconsideration Request received 11/22/05; Reconsideration Decision issued 01/17/06; Outcome: Original decision affirmed (employee granted partial relief)**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8191

Hearing Date: November 3, 2005
Decision Issued: November 9, 2005

PROCEDURAL HISTORY

On, July 25, 2005, Grievant was issued a Group III Written Notice of disciplinary action with a ten workday suspension for:

Abused State resources by allowing landowner to operate State equipment and falsifying records by using more stone than was charged out to the operation.

On August 15, 2005, 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 she requested a hearing. On October 5, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 3, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative

Witnesses

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

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 Transportation employs Grievant as a Superintendent at one of its Facilities. She began working in that position approximately 4 years ago. In October 2004, she received an evaluation showing her overall work performance rating as a "contributor." No evidence of prior disciplinary action against Grievant was introduced during the hearing.

When Agency employees removed excess dirt from various projects in the Residency, the dirt was stored in a giant pile at the Facility. The dirt pile had been so large for so long that several Agency managers including Grievant felt it was time to dispose of the excess dirt.

The Landowner and Grievant (acting on behalf of the Agency) entered into a Property Owner Agreement Maintenance Disposal Site providing that the Landowner authorized the Agency to "dispose of material which consists of topsoil, dirt, and gravel" from various Agency maintenance projects onto the Landowner's property.

October 20, 2004 was the first day VDOT trucks began delivering dirt to the Landowner's property. Grievant and a TOM II were in one of the trucks delivering dirt. The Maintenance Supervisor was operating another truck by himself and he was delivering dirt to the site. Both the TOM II and the Maintenance Supervisor reported to Grievant. Sometime after 9:30 a.m., Grievant and the TOM II were at the site. The Maintenance Supervisor drove his truck onto the property, turned in a circle at the base of the entrance area, backed up and dumped the dirt in his truck into a pile on the ground next to the gully that the dirt that would be used to fill. While sitting in his truck,

the Maintenance Supervisor observed the Landowner approximately 50 yards away operating a VDOT backhoe. The Landowner was using the backhoe to spread dirt. The Maintenance Supervisor knew that the Landowner was not supposed to be operating VDOT property. He did not attempt to speak with the Landowner because he observed Grievant and the TOM II directly in front of his truck walking towards the Landowner. The Maintenance Supervisor¹ assumed that Grievant was walking towards the Landowner to tell him to stop using VDOT equipment. He observed that both Grievant and the TOM II could see the Landowner operating the VDOT equipment.

When the Agency delivers dirt to a site with large trucks, those trucks will track mud onto the highway as the trucks leave the site. In order to prevent this, the Agency will place gravel throughout the entrance to the site. As the Agency began delivering dirt to the Landowner's property in October 2004, Agency employees spread Crush and Run Stone #26 on the Landowner's property to enable trucks to travel from the roadside into the Landowner's property where the dirt was to be dropped. No limit was placed on the amount of stone the Agency could spread on the Landowner's property. The Landowner signed a document acknowledging that "Gravel is to be replenished as necessary."²

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).³ 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).

"Failure to ... otherwise comply with established written policy" is a Group II offense.⁴ The Agency's Asset Management Division Policy No. 3.20 governs authorization to operate equipment and license requirements. This policy provides:

In addition to a valid DMV Driver's License, any person operating any licensed motor vehicle exceeding 10,000 pound GVWR (including

¹ The Maintenance Supervisor received a Group I Written Notice for failing to tell the Landowner to stop using the VDOT equipment.

² Grievant Exhibit 4.

³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁴ DHRM § 1.60(V)(B)(2)(a).

combination units) or any unlicensed, self-propelled equipment operated on public roads (walk behind self-propelled equipment is exempt) must be authorized by the Asset Management Division⁵

By authorizing the Landowner to operate a VDOT backhoe,⁶ Grievant caused this policy to be breached and effectively acted contrary to the policy. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice.⁷ A suspension of up to ten workdays is permitted under the DHRM Policy 1.60, *Standards of Conduct*. EDR's *Rules for Conducting Grievance Hearings* require the Hearing Officer to give deference to the Agency's choice of a ten work day suspension.

Grievant denies that she permitted the Landowner to operate VDOT equipment. She contends that the Landowner told her that the employee in charge of the VDOT equipment was "messing up" and asked "can I move this dirt so that it doesn't meet me at my door?" Grievant responded "yes". The Landowner assumed that when Grievant said "yes" she meant that he had permission to use the VDOT backhoe to move the dirt. Grievant did not believe she was authorizing the Landowner to use VDOT equipment because she did not specifically mention his using VDOT equipment. Thus, Grievant contends the Landowner's use of VDOT equipment occurred because of a misunderstanding of their conversation. Grievant counters testimony of the Maintenance Supervisor who saw her approaching the Landowner when he was using the equipment by suggesting that the Maintenance Supervisor was not a credible witness due to mental health concerns.

The Agency is not required to substantiate its case with absolute certainty. It is only necessary for the Agency to present a preponderance of the evidence; and that can be established with one credible witness. The Maintenance Supervisor's testimony was clear, concise, and credible. He withstood a rigorous cross-examination that an untruthful person would not likely survive. Grievant contends that over several years the Maintenance Supervisor had expressed thoughts of suicide and required extensive prescription medication to counter the effects of emotional and mental instability. Assuming Grievant's contentions were true, an individual's credibility regarding what he has observed is not necessarily affected by concerns over emotional and mental health. Grievant could not explain how the Agency would permit a subordinate to operate very large trucks if the Maintenance Supervisor was under such heavy medication as claimed by Grievant. The Maintenance Supervisor's account is supported by several facts. In particular, testimony showed that Grievant and the TOM II were at the site together only in the morning. The Landowner first asked the TOM II for permission to move dirt. The TOM II told the Landowner to ask Grievant. Grievant then told the

⁵ Agency Exhibit 4.

⁶ Grievant does not contest that the backhoe operated by the Landowner would be covered by this policy and that the Landowner was not authorized under this policy to operate the VDOT backhoe.

⁷ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

Landowner he could move the dirt. Grievant's witnesses testified that the Landowner only moved dirt in the afternoon when Grievant was not present at the site. It is not likely that the Landowner would ask for permission in the morning to move dirt and then wait until the afternoon to begin his work. This is especially true given that the Landowner had to tell the VDOT employee operating the backhoe that he was taking over for the employee under Grievant's instructions. The Landowner would likely have instructed the VDOT employee he was taking over only when Grievant was present. Grievant's presence would enable the Landowner to support his claim to the VDOT employee.

The Agency contends Grievant falsified two Daily Stock and Issue Reports for November 29, 2004. Grievant wrote in the amount of tons of Stone #26 that driver's hauled. The drivers then signed their names to the forms. The forms were used to update the Agency's information system regarding how much Stone #26 the Agency had in inventory. The Agency argues that when Grievant learned that the Internal Auditor would be conducting an audit as a result of a hotline complaint, Grievant became concerned that the Agency would discover that she had underreported the true amount of stone used at the Landowner's site. In order to have the Agency's information system reflect the actual stockpile balances at her Facility, Grievant increased the amounts of stone supposedly used on another maintenance project on November 29, 2004 and November 30, 2004.

"Falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents" constitutes a Group III offense. DHRM § 1.60(V)(B)(3)(b). "Falsifying" is not defined by DHRM § 1.60(V)(B)(3)(b), but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer's interpretation is also consistent with the New Webster's Dictionary and Thesaurus which defines "falsify" as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

The Agency has not met its burden of proof to show that Grievant falsified records. First, the Agency's case relies on too many estimates to reach the conclusion that Grievant must have falsified records. For example, the amount of stone at any given time remaining in the Agency's stockpile is an estimate. There is no scale to measure the beginning and ending amounts of stone. When the stone is scooped out of the Agency's stockpile and placed into a truck, the person loading the stone must

estimate the amount of stone removed from the stockpile and placed into a truck. The Agency did not keep stringent records of how many truck loads of stone were removed from the stockpile. Instead, the Agency relied on the memories and assorted notes of the truck drivers as to how many times they filled their trucks. When Grievant wrote numbers, she also was giving an estimate.

Second, Grievant and the TOM II testified credibility that on November 30, 2004, they observed drivers operating greatly overloaded trucks. For example, trucks that should hold only seven tons of stone were being loaded with approximately 9 tons. This resulted in trucks being operated dangerously. Grievant and the TOM II spoke with several drivers and told them to stop overloading their trucks. In order to correctly report the actual amount of stone that had already been moved, Grievant and the TOM II asked the drivers how many trips they had made with overloaded trucks and then revised the Daily Stock and Issue Reports accordingly. Grievant's motivation was to accurately report the amount of stone delivered and not to cover up how much stone had been delivered to the Landowner over a month earlier. Grievant's assertion is supported because her employees were involved in a major maintenance project on November 29, and 30, 2004. Also, the truck drivers were the ones loading their own trucks. When stone was delivered to the Landowner in October 2004, the employee loading the trucks was an experienced employee who was not also a truck driver. The employees loading their own trucks in November 2004 lacked that level experience.

Third, it is unclear what incentive Grievant would have had to under report the amount of stone she had delivered to the Landowner's property. The Agency's agreement with the Landowner states that the Agency may replenish gravel as necessary. Grievant could have used as much stone as she wished and yet remained within the terms of the Agency's agreement with the Landowner. If Grievant's decision to permit unlimited use of stone was improper, she openly provided evidence of her decision through the written agreement.

Fourth, Grievant and the TOM II made decisions together. If Grievant had falsified records, the TOM II would also have been part of that falsification process. He also filled in some of the revised Daily Stock and Issuance Reports for the drivers to sign. No evidence was presented, however, that the TOM II would have any motive to

Grievant seeks to be reassigned to a Tech IV position within the Residency. The Hearing Officer lacks the authority⁸ to grant such a request and, thus, her request is denied.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with ten workday suspension is **reduced** to a Group II Written Notice with a ten work day suspension.

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 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

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 give a copy of your appeal to the other party. The hearing

⁸ Grievance Procedure Manual § 5.9(b).

officer's **decision becomes final** when the 15-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.⁹

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8191-R

Reconsideration Decision Issued: January 12, 2006

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant re-states her contention that the Landowner operated the VDOT equipment when she was no longer on the property and, thus, she did not observe the Landowner. The Maintenance Supervisor testified that he witnessed Grievant observing the Landowner operate the VDOT equipment. His testimony was credible. The precise time of day Grievant observed the Landowner is not as significant as the fact that Grievant observed the Landowner. The Agency has presented sufficient evidence to support this allegation.

Grievant argues the Agency has inconsistently disciplined its employees because the Maintenance Supervisor only received a Group I but she received greater disciplinary action. The Agency did not inconsistently discipline its employees. The Maintenance Supervisor knew the Landowner was improperly operating VDOT equipment, but he assumed Grievant assented to the use since she observed it and did nothing. As the primary supervisor at the site, Grievant would be in a position to instruct the Landowner to refrain from using Agency property. It is not clear the Maintenance Supervisor believed he had the authority or duty to give instructions to the Landowner. It was appropriate for the Agency to treat the Maintenance Supervisor differently from Grievant.

Grievant again questions the credibility of the Maintenance Supervisor. She argues the Maintenance Supervisor told an investigator that she and the TOM II were at the property “at approximately” the same time. It is unclear what the Maintenance

Supervisor meant by “approximately the same time”, but he indicated that the method of questioning displayed by the investigator caused confusion. Other witnesses expressed concern regarding the unsettling manner of questioning used by the investigator. The Maintenance Supervisor’s testimony at the hearing was credible. The Hearing Officer gives little weight to what the Maintenance Supervisor may have said to the investigator.

Grievant argues the issue of timeliness was not addressed in the hearing decision. She indicated that in December 2004 the Agency decided to issue counseling instead of taking disciplinary action. Grievant’s argument fails because any delay displayed by the Agency was appropriate for the Agency to investigate and consider the appropriate action to take. An Agency may both counsel and issue disciplinary action to an employee.

Grievant argues that she filed her grievance on August 15, 2005, but did not receive a response until September 12, 2005 rather than within five days as required by the Grievance Procedure Manual. Whether a party failed to comply with the Grievance Procedure Manual during the step process is a matter that should be addressed at that time. To the extent the Agency may not have timely responded to Grievant, that issue is moot once the matter is before the Hearing Officer.

Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant’s request for reconsideration is **denied**.

APPEAL RIGHTS

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

1. The 15 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 DHRM, 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.

Carl Wilson Schmidt, Esq.
Hearing Officer