

Issue: Group III Written Notice with suspension (willfully damaging State property); Hearing Date: 12/13/05; Decision Issued: 12/14/05; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8219; Outcome: Employee granted partial relief



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8219

Hearing Date: December 13, 2005  
Decision Issued: December 14, 2005

APPEARANCES

Grievant  
Transportation Maintenance Superintendent  
Representative for Agency  
One witness for Agency

ISSUES

Was the grievant's conduct such as to 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 for willfully damaging state property.<sup>1</sup> As part of the disciplinary action, grievant was suspended without pay for five workdays. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup> The Virginia Department of Transportation (Hereinafter referred to as "agency") has employed grievant as a transportation maintenance crew member for just over six years.

On September 21, 2005, grievant and other employees had been in a meeting in which human resources had advised that some employees might be laid off in the future. Grievant and many other employees were understandably upset after hearing this news. Following that meeting, the human resource manager and a human resource generalist met privately with grievant to discuss an unrelated matter about which he had questions. The human resource employees explained the situation and grievant understood the explanation; he had no concerns and was not upset about that issue. However, before he left, the topic of conversation returned to the possible impending layoffs and grievant did become upset about that.

When he left the meeting, he made an angry comment to the effect that management would do what it wanted to anyway. When he left the office, he exited the building to the parking lot. He walked to the truck parked just outside the door and struck the truck's left rear fender. Grievant is left-handed and maintains that he tripped and hit the truck with this left palm. At this time, the human resource generalist was looking out the office window and saw grievant after he had exited the building. She saw grievant swing with an underhand right punch that hit the truck in what she believed to be a deliberate manner and immediately reported the incident to grievant's immediate supervisor; the truck is assigned to the supervisor.

The truck was examined by grievant's supervisor and a small dent was observed in the approximate area where grievant hit the truck.<sup>3</sup> After this hearing concluded, the hearing officer personally inspected the truck and dent. The photographs make the dent appear larger than it actually is. The dent is very shallow, oval-shaped, measures about 1 inch by  $\frac{3}{4}$  inch, and is not much larger than dings cars get in parking lots. Photographs taken after the incident show three parallel scrape marks running up and to the right at about a 45 degree angle.<sup>4</sup> The largest and most prominent mark leads to the center of the dent. A similar mark at the same angle is visible on the lower right edge of the tool box in the bed of the truck. That mark is consistent with, at the same angle as, and

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<sup>1</sup> Exhibit 3. Written Notice, issued September 27, 2005.

<sup>2</sup> Exhibit 4. Grievance Form A, filed October 14, 2005.

<sup>3</sup> Exhibit 2. Memorandum from human resource generalist, October 14, 2005.

<sup>4</sup> Exhibit 1. Photographs of the dent.

appears to have been made by whatever made the largest mark. At the center of the dent is a tiny crease running up and to the right at the same angle as the scrape marks. The hearing officer also personally inspected the location where the truck was parked on the day of the incident.

### 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>5</sup>

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management 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 of Policy No. 1.60 provides that Group III offenses include

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<sup>5</sup> § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, effective August 30, 2004.

acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. Willfully damaging state property is a Group III offense.<sup>6</sup>

The evidence is sufficient to show that grievant struck a state-owned vehicle. There were only two known witnesses to the incident. The human resource generalist maintains that grievant punched the truck deliberately with his *right* fist. Grievant contends that he tripped on a rock and fell toward the truck. He acknowledges that he hit the truck with the palm of his *left* hand in order to keep from falling down. The generalist did not see grievant stumble or trip and testified that grievant walked up to the truck and punched the side of the truck in a deliberate manner.

Grievant contends that he tripped on a large rock<sup>7</sup> that is sometimes used to prop open the door by which he exited the building. The door in the photograph (Exhibit 8) opens outward and to the right. The rock is normally sitting on the opposite side of the walk from what appears in the photograph. The supervisor testified that on September 21, 2005, he had personally made sure that the rock was on the opposite side of the walk. The supervisor's testimony, in conjunction with the eyewitness testimony of the human resource generalist, outweighs grievant's denial of a deliberate act. The hearing officer viewed the location where the incident happened. If grievant had tripped on the rock and fallen forward, he would have contacted the truck's front fender or possibly the driver's door. It is highly improbable that he would have contacted the rear fender of the truck. It is therefore much more likely than not that grievant deliberately hit the truck to vent his anger about the layoff news.

However, after having viewed the truck, it is concluded that grievant did not cause any damage. Grievant is young and has large, tough hands that have seen much physical work. If grievant had hit the truck so forcefully as to damage it, the mark would have been completely different from the small dent on the fender. The damage to the fender would have been significantly larger and shaped differently than a small oval ding. More importantly, the photographs show several scrapes leading toward the dents. These scrapes left a residue which could not have come from grievant's hand. The center of the dent has a tiny crease at the same angle as the scrape marks that is also not consistent with a fist mark. After carefully viewing the vehicle and the photographs, the most likely explanation is that a tree branch or tool hit the truck causing both the scrapes and the small dent. Whatever caused this damage, it was not grievant's hand. Therefore, even though grievant hit the truck, the agency has not shown that he *damaged* the state vehicle.

Having concluded that grievant's actions did not cause any actual damage, a Group III offense cannot be sustained. However, grievant's angry

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<sup>6</sup> Exhibit 5. Section V.B.3, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>7</sup> Exhibit 8. Photograph of rock sometimes used to prop door open.

action in hitting the truck did constitute disruptive behavior. As a result of the incident, human resources and management employees had to take time to investigate the incident. This use of people and time is something that would not have been necessary had grievant not been so upset as to hit the truck. To the extent that people and time were required to investigate the incident, this constitutes a disruption to the normal business of the agency. Accordingly, the appropriate level of discipline for grievant's behavior is a Group I Written Notice.

### DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice issued on September 27, 2005 for damaging a state vehicle is hereby REDUCED to a Group I Written Notice for disruptive behavior.

The agency shall remove the Group III Written Notice from grievant's file and issue a Group I Written Notice for disruptive behavior.<sup>8</sup> The agency shall reimburse grievant for the five days suspension time.<sup>9</sup>

### 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. Address your request to:

Director  
Department of Human Resource Management  
101 N 14<sup>th</sup> St, 12<sup>th</sup> floor  
Richmond, VA 23219

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<sup>8</sup> The issuance date will still be September 27, 2005, and the inactive date will be September 27, 2007.

<sup>9</sup> Since grievant does not have three active written notices, this Group I Written Notice does not support a suspension pursuant to Section VII.D.1.b(1) of Policy 1.60.

3. If you believe 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. Address your request to:

Director  
Department of Employment Dispute Resolution  
830 E Main St, Suite 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 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.<sup>10</sup> 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>11</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/David J. Latham*

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David J. Latham, Esq.  
Hearing Officer

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<sup>10</sup> An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>11</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.