

Issue: Group III Written Notice with termination (removing surplus property without authorization); Hearing Date: 01/09/06; Decision Issued: 01/11/06; Agency: VITA; AHO: Carl Wilson Schmidt, Esq.; Case No. 8237; Outcome: Agency upheld in full



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8237**

Hearing Date: January 9, 2006  
Decision Issued: January 11, 2006

**PROCEDURAL HISTORY**

On October 20, 2005, Grievant was issued a Group III Written Notice of disciplinary action with removal for removing surplus property without authorization or permission. On October 23, 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 he requested a hearing. On December 8, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 9, 2006, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUE**

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. 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 Information Technologies Agency employed Grievant as a Computer Operations Manager I at a Facility of another State agency. The purpose of his position was, "Coordinates help desk support calls through the supervision of installation and repair technicians. Serves as Assistant LAN manager to include, security, administration, backup and configuration."<sup>1</sup> He worked for the Commonwealth of Virginia for approximately 10 years prior to his removal effective October 20, 2005. Grievant's work performance was satisfactory to the Agency prior to the issuance of the disciplinary action. No evidence of prior disciplinary action was introduced during the hearing.

In February 2005, several Agency employees working with Grievant at the Facility were moving to new offices. Grievant asked the surplus manager whether he could obtain four chairs belonging to the Commonwealth of Virginia and place those chairs in an office used by the Agency. The surplus manager agreed and Grievant obtained four chairs. He placed the chairs in a co-worker's office. The co-worker did not like the chairs. Grievant removed the chairs from the office and placed them in the restroom of a nearby building. He did not tell his Supervisor of the new location of the

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<sup>1</sup> Agency Exhibit 3.

chairs. He did not notify the surplus manager of the chairs new location. The chairs remained stored in the restroom for approximately 8 months.

Grievant was under the impression that because the chairs were not tagged or had other identifying marks, the chairs were “not accountable” by the State. He considered them as “ready for the trash heap.” He did not believe there would be a problem with borrowing the chairs for a brief period of time. Grievant entered into an agreement with his neighbor such that the neighbor would transport the chairs in his pick up truck in return for Grievant performing some computer work for the neighbor. In the second week of September 2005, Grievant and the neighbor removed the chairs from the restroom and took them to Grievant’s apartment. Grievant believed that his apartment was too small to keep the chairs so he asked the neighbor to keep the chairs until they had the chance to obtain a table that might complement the chairs.

On October 12, 2005, the surplus manager inquired regarding the location of the chairs.<sup>2</sup> Grievant stated that he had the chairs. When Agency managers asked Grievant additional questions about the chairs, Grievant answered truthfully. In October 2005, the Agency learned that the chairs were missing from the Facility. When the topic arose regarding the location of the chairs, Grievant quickly responded that he had the chairs. He was truthful and fully answered the Agency’s questions about having taken the chairs. He obtained the chairs and returned them to the Facility.

## 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>3</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).

[U]nauthorized removal of ... state property” is a Group III offense.<sup>4</sup> Ownership of the chairs remained at all times with the Commonwealth of Virginia. The chairs were State property.<sup>5</sup> Grievant removed the chairs from the Facility and began using those

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<sup>2</sup> The Facility sometimes held auctions to sell surplus property.

<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</sup> DHRM Policy 1.60(V)(B)(3)(d).

<sup>5</sup> The chairs were neither lost nor abandoned property. See, 1 Michie’s Jurisprudence § 1, “Generally, abandonment of property means that the owner thereof voluntarily relinquishes possession with the

chairs for a purpose other than the business of the Commonwealth of Virginia. Grievant did not obtain permission from any State employee who could have authorized his removal. Grievant removed State owned chairs without authorization thereby justifying the issuance of a Group III Written Notice. Removal from employment is authorized by DHRM Policy 1.60 upon the receipt of a Group III offense. Grievant's removal must be upheld.

Grievant contends the disciplinary action should be mitigated because he believes removal from employment is too harsh. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."<sup>6</sup> Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.<sup>7</sup>

## 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 **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.

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intention of terminating his ownership and with no intention of vesting title in another. 'Abandonment' means a yielding to ... withdraw protection, support or claim ...."

<sup>6</sup> *Va. Code § 2.2-3005.*

<sup>7</sup> Grievant made a false assumption regarding whether he could remove State property from the Facility. It is not necessary for the Agency to show Grievant knew he was acting improperly. The absence of an intent to act improperly is not a basis to mitigate under the *Rules for Conducting Grievance Hearings*.

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 14<sup>th</sup> St., 12<sup>th</sup> 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 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.<sup>8</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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>8</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

