

Issue: Group III Written Notice with termination (removing State property without authorization); Hearing Date: 03/09/06; Decision Issued: 03/20/06; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8282; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8282

Hearing Date: March 9, 2006
Decision Issued: March 20, 2006

PROCEDURAL HISTORY

On October 21, 2005, Grievant was issued a Group III Written Notice of disciplinary action for removing gun cleaning items from a Department of Corrections facility without authorization. On November 18, 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 February 6, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 9, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
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 Department of Transportation employed Grievant as Transportation Operator II until his removal effective October 21, 2005. The purpose of Grievant's position was to perform "maintenance and construction activities using different types of medium to light equipment."¹ Grievant received a Group I Written Notice on September 17, 2004 for inadequate or unsatisfactory job performance.² Grievant's work performance otherwise had been satisfactory to the Agency.

One of Grievant's duties was to participate in activities with staff of the Department of Corrections. His duties involved interaction with inmates.³ The Department of Corrections required him to meet certain standards including receiving a DOC certificate after completing DOC firearms training.

In September 2005, Grievant attended firearms training taught by a DOC Captain at a DOC facility. During the training, Grievant and the other students used firearms. At the end of the class, each student was expected to clean his or her weapon using a

¹ Agency Exhibit 4.

² Agency Exhibit 5.

³ Grievant had worked as an inmate relief foreman for approximately six and a half years.

cleaning kit owned by the Department of Corrections and made available to the students. After cleaning their weapons, the students were expected to return the cleaning instruments to the cleaning kit. Grievant used several items to clean his weapon. Rather than returning all of the items to the cleaning kit, Grievant kept three items. After the training ended, Grievant spoke with two other VDOT employees in the DOC facility parking lot. Grievant and the TOM II began speaking about hunting season and trapping. Grievant then pulled out three gun cleaning tools⁴ from his pocket. Grievant said he could have purchased the items elsewhere but took the items “for the thrill of it”. Grievant then returned the items to his pocket.

Once the Agency learned Grievant may have taken items from DOC, Agency staff confronted Grievant. Grievant admitted taking a small wire metal brush. The DOC Captain conducting the training determined that Grievant should not receive the DOC certification that Grievant would otherwise have obtained by completing the DOC training.

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).⁵ 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).

“Theft or unauthorized removal of ... state property ...” is a Group III offense.⁶ Grievant removed State property from a DOC facility during the course of DOC training he received as part of his employment with VDOT. No one authorized Grievant to remove the items and there is no reason to believe Grievant would have been authorized to remove the items had he asked to remove them. Grievant had no independent authority to remove the items. The Agency has presented sufficient evidence to support its issuance of a Group III Written Notice. Removal from employment is appropriate upon the issuance of a Group III Written Notice.

Grievant argues that he mistakenly removed a single brush and only noticed he had it in his pocket once he was outside of the training building. If the Hearing Officer assumes for the sake of argument that Grievant’s description of the facts is true,

⁴ The items were two cleaning brushes and a ramrod.

⁵ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁶ DHRM Policy 1.60(V)(B)(3)(d).

Grievant did not manifest any intent to return the brush. He testified he kept the brush because he did not wish to return it and possibly get a DOC employee in trouble for failing to keep proper inventory. Grievant's motive would not excuse his failure to return what did not belong to him. There is no reason to believe Grievant would ever have returned the brush had his removal of the brush not been discovered. Thus, even under Grievant's version of the facts, the Agency has presented sufficient evidence to support its issuance of a Group III Written Notice with removal.

Grievant argues that others in the Agency has lost licenses necessary to perform their duties yet retained their jobs. Grievant's argument is not relevant in this case. Grievant was not removed from employment because he lost is his DOC certification. Indeed, losing a certification is not in itself a basis to take disciplinary action through the issuance of a Written Notice. Grievant was removed from employment because he removed State property without authorization.⁷

Grievant contends the disciplinary action should be mitigated. *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..."⁸ 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.

Grievant contends he was subject to discrimination and retaliation.⁹ No credible evidence was presented to support this allegation. The evidence showed that the Agency disciplined Grievant for his unauthorized removal of State property and for no other reason.

DECISION

⁷ Although a step respondent mentioned Grievant's failure to obtain a DOC certificate, the Written Notice focuses on the unauthorized removal of State property and does not mention failure to obtain certification.

⁸ *Va. Code § 2.2-3005.*

⁹ Grievant contends the Agency retaliated against him because he was "outspoken" about his desire to obtain additional training. In order to establish retaliation, Grievant must show he engaged in a "protected activity." Seeking training is not a protected activity. Thus, Grievant has not established a basis for his claim of retaliation.

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.
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 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.¹⁰

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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

Carl Wilson Schmidt, Esq.
Hearing Officer