

Issues: Group III Written Notice (unauthorized use/removal of State property), and Suspension; Hearing Date: 06/12/07; Decision Issued: 06/27/07; Agency: JMU; AHO: Lorin A. Costanzo, Esq.; Case No. 8625; Outcome: Agency Upheld In Full.

Commonwealth of Virginia

JAMES MADISON UNIVERSITY

DECISION OF HEARING OFFICER

In re: Grievance Case No. 8625

Hearing Date: June 12, 2007

Decision Date: June 27, 2007

PROCEDURAL HISTORY

On April 6, 2007, Grievant was issued a Group III Written Notice with suspension for 10 work days for unauthorized removal of state property.¹ On April 6, 2007, Grievant timely filed a grievance to challenge the disciplinary action.² On May 24, 2007, the Department of Employment Dispute Resolution assigned this grievance to the Hearing Officer. A hearing was held at James Madison University (“Agency”) on June 12, 2007.

APPEARANCES

Grievant (also testified as witness)
Faculty member
Staff
Agency Representative
Agency Party Designee
Manager PC Services
Manager Surplus Property
Space Management Coordinator

ISSUES

Were the Grievant's actions such as to warrant disciplinary actions under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its

¹ Agency Exhibit 8. Written Notice issued April 6, 2007.

² Grievant Exhibit 1. Grievance Form A.

disciplinary action against Grievant was warranted and appropriate under the circumstances.³ A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.⁴

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Grievant has worked approximately 10 years in PC Services within Agency and is employed as a Lab Mechanic B. Grievant also had duties as building coordinator of the warehouse. Grievant works in a warehouse facility within Agency that contains a number of designated areas each under the control of different Agency personnel/departments. Included in the warehouse facility are PC Services area, "Swing Space" area, "Surplus Property" area, and other designated areas.

The "Swing Space" area is an unsecured open area in the warehouse. "Swing Space" is temporary storage where property frequently comes in and out and which is under the control of the Space Management Coordinator. Within the "Swing Space" is a fire/travel lane which runs through the "Swing Space" area and up to the roll-up door entrance to the "Surplus Property" area. The fire/travel lane is approximately 8 to 9 feet wide and designated by two white lines along its perimeter. This lane is utilized by vehicles traveling through the building and is generally kept open and free of any materials to facilitate vehicle and forklift travel in the warehouse building. The "Surplus Property" area is isolated from other areas behind a roll-up door in the warehouse. The "Surplus Property" area and surplus property is under the control of the Manager of Surplus Property.

Grievant is not authorized to remove and dispose of surplus property.

On 3/27/07 certain boxes of surplus property and marked "Surplus" were located, with permission of the Space Management Coordinator, in "Swing Space" waiting inspection by the surplus property division to determine the contents of the boxes and the disposition of the contents. The property required inspection to determine if any property could be used within Agency, transfer to other agencies, sold, recycled, or disposed of. Additionally, the surplus property division needed, per policy, to inspect the contents to determine if there were any documents that raise issues of confidentiality or privacy that needed to be addressed.

On 3/27/07 Grievant removed approximately 6 to 8 boxes of surplus property from "Swing Space" and put them into a dumpster. These boxes were clearly marked "Surplus" and were awaiting inspection and a determination by surplus property division as to disposition of the contents. These boxes contained property from two faculty members' lab/office who were moving into a smaller lab/office arrangement with less storage. Both faculty members had received authorization to move property into "Swing Space".

³ §5.8, Department of Employment Dispute Resolution, Grievance Procedure Manual, effective August 30, 2004.

⁴ §5.9, Department of Employment Dispute Resolution, Grievance Procedure Manual, effective August 30, 2004.

CONCLUSIONS OF LAW AND POLICY

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 of Virginia. 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 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 of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in 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 employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001."

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management ("DHRM") promulgated the *Standards of Conduct, Policy No. 1.60, effective 9/16/93*. 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. Agency has promulgated Policy 1317 (date of current revision: June 2006) - *Standards of Conduct and Performance for Classified Employees* which complies with Virginia Department of Human Resource Management Policy 1.60: *Standards of Conduct*.

Unacceptable behavior is divided into three groups according to the severity of the behavior. Group III offenses include acts and behaviors of such a serious nature that a first occurrence normally should warrant removal. Policy 1317 sets forth as a Group III offense, "Theft or unauthorized removal of state records, state property or property of other persons (including, but not limited to, employees, patients, students, supervisors and visitors)". Policy 1317 also provides that, "The offenses set forth below are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any action, which in the judgment of the university, undermines the effectiveness of the university's activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section."⁵

Grievant was given a Written Notice for a Group III offense for unauthorized removal of

⁵ Agency Exhibit 3. Policy 1317, Standards of Conduct and Performance for Classified Employees, Date of Current Revision: June 2006.

state property. Grievant does not contest that he removed boxes marked “Surplus” from “Swing Space” area and disposed of this property by placing the boxes in the dumpster. He contends that the property was trash, he was cleaning up the area, and the property encroached on the fire lane.

Agency has submitted sufficient evidence to establish a.) that as building coordinator, Grievant’s authority was to monitor and report any problems to the appropriate staff and his authority did not extend to removing and disposing of property from “Swing Space”; b.) as a member of PC Services he was not authorized to dispose of property in “Swing Space”; and c.) Grievant did not have authority to remove or dispose of surplus property including property marked “Surplus” located in “Swing Space”.

On 3/27/07 Grievant removed from “Swing Space” boxes marked “Surplus” containing surplus property and placed the boxes in a dumpster. Grievant knew the boxes were labeled as containing surplus property. Grievant contends Manager of Surplus Property indicated she did not want the property he placed in the dumpster. However, Manager of Surplus Property denied she ever stated to Grievant that she didn’t want the property Grievant removed from “Swing Space” and disposed of in the dumpster.

Grievant contends that the property in the boxes was not state property and was of no value. The property was, prior to being moved into “Swing Space”, used at or stored in the Agency labs/offices of two faculty member. The two were authorized to use “Swing Space” for storage when smaller facilities were assigned them. They were asked to organize the property placed in “Swing Space” and agreed to sort the property into a pile they wanted to keep and a pile they did not wish to keep themselves.⁶ One faculty member had previously moved a research laboratory from an out of state University to Agency and the other had moved property from an in state University to Agency. Faculty Member opined he was uncertain if the property was state property or not but he believed some state property may have been involved as to the other faculty member’s property. Faculty Member also testified he originally proposed that the property in the “Swing Space” area be sorted into three categories, “Stuff that can be discarded”, “Stuff we really want to keep”, and “Stuff we might need.... but which we think is to the advantage of Agency to keep, because it would be so expensive to replace”.

Manager of Surplus Property indicated the property Grievant removed and placed in the dumpster was state property. It was not contested that the property had been stored at Agency, was under the control of Agency, and utilized in Agency’s work. Further Faculty Member’s testimony indicated concerns as to Agency’s expenses that would be incurred as to replacement of these items. Issues as to repair expenses for the property were also raised. Initially, items stored in “Swing Space” included, PCs, cages, papers, documents, equipment, and journals. Grievant indicated that he was told “...there was a possibility the items were not clean due to the use of some type of bird experiments”.⁷

The property stored in the “Swing Space” was used by the Agency, was under the control of the Agency, and was the responsibility of the Agency. The property Grievant removed and

⁶ Grievant Exhibit 4. Letter of 5/1/07 from Faculty Member.

⁷ Grievant Exhibit 1. Grievance Form A.

placed in the dumpster was state property. The exact value and contents of the boxes are not know. However, this is due to Grievant's actions of removing and disposing of the property without authority to do so prior to an inspection and classification for disposition by the surplus property division.

Grievant contends that the property he disposed of was in the fire/travel lane. Space Management Coordinator and Manager of Surplus Property indicated that property was not in the fire/travel lane when it was removed by Grievant. The Manager of Surplus Property did indicated that when the property originally arrived in the warehouse it may have been in the fire /travel lane but once the Faculty Member sorted it into what was to be kept and what was to be processed for surplus, salvaged, recycled, etc it was not in this area. A student indicated via letter that for a few days there were items in the fire lane which went through the "Swing Space".⁸ A moving crew supervisor indicated he observed property in the fire lane.⁹ Even if the property were in the fire/travel lane or encroach on the fire/travel lane Grievant did not have authority to dispose of the property. Grievant's authority as building coordinator only gave him the authority to report this matter to a supervisor or manager. He did not have authority to dispose of the property and his authority working in PC Services did not extend to disposal of the property in "Swing Space".

The property was authorized to be in "Swing Space" and was being stored there prior to inspection and determination of disposition with the knowledge of the Manager of Surplus Property. Grievant was not authorized to remove or dispose of the property. Grievant's removal of the property clearly marked as "Surplus" from "Swing Space" and his disposal of the property was unauthorized and violated policy. The Agency had a duty to inspect and determine a proper disposition for surplus property as required by policy and statute. Grievant's actions in removing the property also acted to deny the Agency the ability to inspect to protect confidentiality and privacy.

DHRM Policy No. 1.60, effective 9/16/93, Section (VII) (C)(I), Standards of Conduct, provides that while disciplinary actions imposed shall not exceed those set forth in this policy for specific offenses, agencies may reduce the disciplinary action if there are mitigating circumstances, such as: a.) conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or b.) an employee's long service or otherwise satisfactory work performance.

The Agency took under consideration a number of factors, including Grievant's Work History, Performance Evaluation, Improvement Needed Notifications, and prior counseling received. Grievant received a performance evaluation, prepared September 18, 2006, indicating "Contributor in 4 of 5 areas and "Below Contributor" in one area. The performance evaluation noted Grievant need to improve on his professional and courteous dealings with other staff members including improper/unprofessional treatment towards a co-worker and he was counseled on the way to treat personnel respectfully and professionally. Grievant was given an "Improvement Needed Notification Form" dated February 7, 2006, for falling asleep during a staff meeting on February 2, 2007.¹⁰ A Memo for the Record addressed issues of working with

⁸ Grievant Exhibit 5. Letter of 5/1/07.

⁹ Grievant Exhibit 7. Letter of 6/8/07.

¹⁰ Agency Exhibit 2. Performance Management "Improvement Needed" Notification Form.

co-workers and he and the other party were sent to mediation. Additionally, it was noted that he had been counseled on two other occasions and told he was not to enter the Surplus Property area without an appointment unless it was an open period.¹¹ No evidence was presented indicating Grievant has any active Written Notices. The Agency took into consideration their concern Grievant properly does his job, their concern he not exceed his authority, and their concern he not infringe on the responsibility/authority of other Agency staff.¹² Grievant was not terminated under the Group III because, in other areas, he was considered by the Agency to be a very good and hard working employee.

The Code of Virginia, Section 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 the rules established by the Department of Employment Dispute Resolution.¹³ The Hearing Officer is required under the EDR Director’s *Rules for Conducting Grievance Hearings* to consider management’s right to exercise its good faith business judgment 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. If an agency presents facts sufficient to support the level of disciplinary action it has chosen, the Hearing officer must give deference to that selection.

Upon reviewing the facts de novo (afresh and independently, as if no determinations had yet been made) it is determined that (i) Grievant engaged in the behavior described in the Written Notice; (ii) The behavior constituted misconduct; (iii) the Agency's discipline was consistent with law and policy. Furthermore the Agency’s discipline did not exceed the limits of reasonableness. The Agency has proven by a preponderance of the evidence that the disciplinary action of issuing a Group III Written Notice with 10 day suspension was warranted and appropriate under the circumstances.

DECISION

For the reasons stated herein, the Agency’s issuance of a Group III Written Notice with disciplinary action taken in addition to issuing written notice of suspension for 10 days is UPHELD.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

¹¹ Agency Exhibits 5 and 6. E-mails and Memo for the Record dated 30 August 2006.

¹² Testimony of Director of PC Services.

¹³ Va. Code Section 2.2-3005(C)(6).

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state policy or Agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to:

Director, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to:

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

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the date of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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. You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Lorin A. Costanzo, Hearing Officer