

Issue: Group I Written Notice (failure to follow policy); Hearing Date: 08/06/07;
Decision Issued: 08/22/07; Agency: Dept. of ABC; AHO: Carl Wilson Schmidt,
Esq.; Case No. 8640; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8640

Hearing Date: August 6, 2007
Decision Issued: August 22, 2007

PROCEDURAL HISTORY

On March 28, 2007, Grievant was issued a Group I Written Notice of disciplinary action for violating Agency policy governing the use of State-issued equipment. In particular, his State vehicle was stolen containing certain Agency property. On April 24, 2007, 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 July 6, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 6, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Representative
Witnesses

ISSUES

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 Department of Alcoholic Beverage Control employs Grievant as a Special Agent. The purpose of his position is:

Special Agents are assigned to the Bureau of Law Enforcement Operations and provide specialized law enforcement services and guidance to other law enforcement officers, public officials, citizens of the Commonwealth, persons manufacturing, selling and transporting alcoholic beverages, and transporting and selling tobacco products. This position: is assigned to one of eight large geographic regions; manages law enforcement operations in a specific geographic territory; initiates and conducts a wide range of moderate to complex investigations and makes arrests for violation of alcohol, tobacco, narcotics, fraud, financial fraud statutes and testifies in state and federal courts. Special agents routinely: conduct surveillance; work undercover; manage undercover operations; supervise underage buyers of alcoholic beverages and tobacco; develop and perpetuate confidential sources of information; and serve as Agency Advocates, preparing and presenting disciplinary cases to ABC Hearing Officers. Some Special Agents have additional assignments such as

instructor, electronic surveillance technician, pilot, or member of a local, state or federal task force.¹

Grievant has been employed by the Agency for over ten years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Grievant does not like to operate the air conditioning in his vehicle. He prefers to lower his vehicle's windows when it is warm outside.

On October 20, 2006, Grievant drove his State-owned 2000 Chevy Lumina² to a restaurant near his residence. He was on his way to a location to conduct a surveillance. He parked the vehicle and used the electric lock on the driver's door to lock all four doors. He had rolled up all the windows to the vehicle with the exception of the rear passenger side window. He left that window down with an opening of approximately eight to ten inches. He left several personal and State-issued items inside the vehicle. These items included a personal .380 semi-automatic handgun and a State owned cell phone, vest, and flashlight. Grievant left a key ring with his keys including the key to the car inside the vehicle. Inside the trunk to the vehicle were a 870 shotgun and electronic surveillance equipment belonging to the Agency.

Grievant left the restaurant and walked to his residence. He did not feel well so he did not travel in his vehicle to conduct a surveillance as he had originally planned. He went to sleep.

The Thief was also in the restaurant while Grievant was there. After Grievant left, the Thief left the restaurant and passed by Grievant's vehicle and observed that the rear passenger side window was down several inches. The Thief is a tall, thin man who is a convicted felon. The Thief reached inside the window and opened the door. He entered the vehicle and found the keys to the vehicle. He drove Grievant's vehicle approximately 12 blocks away to a trailer park. The Thief attempted to sell, give away, bury, or destroy many of the items he found inside the vehicle.

When Grievant woke up the following morning, he went to find his vehicle. It was missing. He reported the matter to the local Sheriff's office and to the Agency. Grievant asked an individual who lived in the area to ride around and see if he could locate the vehicle. Later, that person called Grievant and told Grievant he had found Grievant's vehicle at a trailer park. Grievant contacted the Sheriff's office and went with the individual to the trailer park. They waited until the Corporal from the Sheriff's office arrived. When the Corporal arrived, he found the vehicle in good condition but several items inside the vehicle were missing. The doors were locked except for the driver's door and the rear passenger door. The rear passenger window was halfway open.

¹ Hearing Officer Exhibit 1.

² The vehicle was unmarked. It did not appear to be a law enforcement vehicle.

Grievant pondered who could have stolen the vehicle. He remembered an unusual looking man who did not seem to fit in with the other patrons at the restaurant. He contacted the Bartender working at the restaurant and asked for the identity of the man. He concluded that the man was the Thief and notified the Sheriff's office. The Corporal was able to recover the missing personal property except for the State-issued cell phone and reflective traffic vest. The Thief was apprehended, made a full confession, and then charged, convicted, and sentenced.

After considering the matter, the Agency chose not to require Grievant to reimburse it for the un-recovered State-issued property.

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).

The Agency contends Grievant failed to comply with General Order A-009, *Care and Responsibility of State-Issued Equipment*. This policy provides in relevant part:

Each Agent is personally responsible for the maintenance and care of their assigned equipment. Should any equipment be lost or damaged due to negligence, the Agent may be held responsible for the repair or replacement of those items.

An employee immediately upon discovering any Department equipment for which they are responsible has been lost, stolen, or destroyed, will notify the appropriate Deputy Director, via chain of command with a prompt detailed written report as to what occurred.⁴

Grievant complied with General Order No. A-009 because he notified the Agency and was willing to pay the cost of stolen items. The policy requires Grievant to be personally responsible for property in his possession. The Agency declined to seek reimbursement from Grievant for the stolen items that were not recovered. The policy does not require Grievant to lock the doors to his car or take action to ensure property in

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

⁴ Agency Exhibit 1.

his care is not stolen. The policy merely assigns him reporting and financial responsibility in the event his property is stolen. Violation of a State policy is usually a Group II offense. The Agency has not established a Group II offense by Grievant.

Although Grievant did not violate General Order No. A-009, he acted contrary to the DHRM Policy 1.60 Standards of Conduct. Inadequate or unsatisfactory job performance is a Group I offense under the Standards of Conduct. Any employee entrusted with Agency property is expected to maintain that property with reasonable care and avoid damage or theft of that property. It is not necessary for an agency to establish a separate policy setting forth an obligation that is implicit in the act of an agency entrusting property to an employee. In this case, Grievant failed to raise one of the windows to his State owned vehicle. His vehicle contained weapons. As a result of Grievant's failure to raise the window of his vehicle, a thief was able to steal his vehicle and its contents. Grievant was obligated to take reasonable care of State owned property once it was entrusted to him. He failed to do so because he failed to raise the window to his vehicle. Grievant knew or should have known that leaving a car window half way open would provide a means for someone to gain entry to the vehicle. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for inadequate or unsatisfactory job performance.

Mitigation

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..."⁵ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant contends the disciplinary action should be mitigated given that he simply made a mistake and that he was the one who was successful in apprehending the thief. To the extent these are mitigating factors, however, there are counterbalancing aggravating factors. In particular, Grievant's vehicle contained two weapons. The consequences for making a simple mistake are far higher when that mistake may result in the transfer of weapons into the hands of a criminal. In light of the standard set forth in the *Rules*, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁵ *Va. Code § 2.2-3005.*

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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 all of your appeals to the other party and to the EDR Director. 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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.