

Issues: Group II Written Notice with suspension (failure to follow instructions and unauthorized use of State property); Hearing Date: 10/12/07; Decision Issued: 10/15/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8705; Outcome: No Relief, Agency Upheld in Full.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8705**

Hearing Date: October 12, 2007  
Decision Issued: October 15, 2007

**PROCEDURAL HISTORY**

On June 22, 2007, Grievant was issued a Group II Written Notice of disciplinary action with five work days suspension for failure to follow supervisor's instruction and unauthorized use of State property or records. On July 20, 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 September 10, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 12, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
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 Virginia Department of Transportation employs Grievant as a Transportation Operations Manager II at one of its Facilities. He is responsible for supervising approximately 15 employees and responsible for maintenance of the highway system. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On October 27, 2006, Grievant received a Counseling Memorandum from the Supervisor stating:

On October 13, 2006, by your own admission, you drove your state vehicle to work between 8 p.m. and 8:30 p.m. to complete work that you had forgotten while working during the day. After completing the work, you drove your state truck to [a lumber store] and bought materials for your personal use. You then placed those materials in the pickup truck and drove it back home.

This counseling memorandum serves as documentation to advise you that the state truck is for state use and purpose only. You are expected to complete your routine work during normal business working hours. Any

use of state vehicles after normal business hours should be due to emergencies or call-outs. It is unacceptable for you to use the state pickup for personal gain and this includes shopping for personal use. Please be advised that you will follow the rules concerning state vehicle usage and if you fail to do so, disciplinary action will be the result.<sup>1</sup>

The Agency had assigned Grievant a State vehicle. He had been authorized to use the vehicle to commute to work because he often had to leave the office and travel to job sites in his jurisdiction. On May 25, 2007, Grievant drove his personal vehicle from his home to the Residency office. He did so because he intended to run personal errands during the day and he knew he could not use his State vehicle to do so. At approximately 10:45 a.m., Grievant needed to travel to a job site. He asked the shop manager if a State vehicle was available for his use. The shop manager told Grievant he could use his Supervisor's State vehicle because she was on vacation. According to Grievant, he drove the Supervisor's State vehicle to the job site. At approximately 11:45 a.m., Grievant drove the Supervisor's State vehicle from the jobsite to his home. He drove for more than 30 minutes in order to arrive home. The Supervisor lived near Grievant's home. At approximately 12:25 p.m., the Supervisor drove by Grievant's home and observed her assigned State vehicle and Grievant's assigned State vehicle in his driveway. She thought this was unusual, so she contacted her supervisor. The Agency decided to initiate disciplinary action.

### 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>2</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).

"Failure to follow a supervisor's instructions" is a Group II offense under DHRM Policy 1.60, *Standards of Conduct*. "Unauthorized use or misuse of State property or records" is a Group II offense. Under the Agency's Vehicle Assignment and Use Policy, "[a]ll passenger-type vehicles or trucks owned by VDOT or assigned through the Centralize Fleet are provided for the conduct of official state duties, and are not to be used for personal business." The Agency's policy also provides, "[a]ny employee who

---

<sup>1</sup> Agency Exhibit 2.

<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

fails to comply with established written policy or who misuses State property is subject to a Second Group Offense under the State Standards of Conduct.”<sup>3</sup>

Grievant drove a VDOT vehicle from a job site to his home without prior authorization from a supervisor. This trip was not in furtherance of State business. Grievant failed to comply with the Supervisor’s instruction given October 27, 2006 that “the state truck is for state use and purpose only.” Grievant failed to comply with the Agency’s policy stating that vehicles owned by VDOT were to be used “for the conduct of official state duties, and are not to be used for personal business.” Grievant misused State property. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. A suspension of up to 10 workdays is authorized upon the issuance of a Group II Written Notice. Accordingly, Grievant’s five work day suspension is upheld.

Grievant argued that he left the job site and drove to his home for State business for three reasons. First, he left his State badge in his State vehicle which was parked in the driveway of his home. Second, he needed to read the mileage on his State vehicle so that he could complete a mileage report required by the Agency. Third, he needed to obtain his personal cell phone. His State issued cell phone was being repaired and he did not have any means of calling his work crews without his personal cell phone.

Grievant’s arguments fail. First, although the Agency required Grievant to have his State identification badge with him, he had already worked half of the day with out it and it was not unusual for Agency employees to forget their badges. The Agency had never disciplined an employee for failing to wear a State badge. Second, it was not necessary for Grievant to drive to his home on May 25, 2007 to read the odometer of his State vehicle. The mileage information was not due to be reported for another three to four business days. Third, Grievant was in possession of his personal cell phone contrary to his assertion that that he had left it in his State vehicle at his home. Grievant testified that he was the only one who used his cell phone. Grievant submitted a record of his cell phone usage. On May 25, 2007 at 9:39 a.m., a call lasting approximately four minutes was placed from that cell phone to Grievant’s home telephone number. It originated through a cell phone tower near Grievant’s office. Its destination was a cell phone tower near Grievant’s home. At 11:13 a.m., a call lasting approximately two minutes was placed from Grievant’s cell phone to a mobile cell phone number. The call originated through a cell phone tower near Grievant’s office. At approximately the time (11:39 a.m.) Grievant testified he was traveling on the highway towards his home, a call lasting approximately two minutes originated from a cell phone tower near the highway. The call was made to a mobile cell phone number. Grievant testified that he needed to obtain his cell phone in order to make calls to members of his three work crews. Grievant did not present any evidence that he made any calls to his work crews after he supposedly obtained his cell phone. There is no credible evidence that Grievant drove a State vehicle to his home in furtherance of official State business.

---

<sup>3</sup> Agency Exhibit 4.

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>4</sup> 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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension 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 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

---

<sup>4</sup> Va. Code § 2.2-3005.

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.<sup>5</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.