

Issues: Group II Written Notice (failure to follow policy) and Suspension; Hearing Date: 01/23/08; Decision Issued: 01/28/08; Agency: VPI&SU; AHO: Carl Wilson Schmidt, Esq.; Case No. 8773; 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: 8773

Hearing Date: January 23, 2008
Decision Issued: January 28, 2008

PROCEDURAL HISTORY

On October 1, 2007, Grievant was issued a Group III Written Notice of disciplinary action with suspension for criminal convictions for (1) acts of conduct occurring on or off the job that are clearly related to job performance and (2) the unauthorized removal of State-owned property in violation of surplus property disposal guidelines. On October 8, 2007, Grievant timely filed a grievance to challenge the Agency's action. At the Second Step of the grievance process, the Agency reduced the discipline to a Group II Written Notice with a five workday suspension for "'Failure to comply with established written policy', specifically, University Policy 3955, Management of Surplus Property". The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 2, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 23, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
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:

Virginia Tech has employed Grievant as a plumber for approximately 17 years. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

The State Internal Auditor received a complaint through its Hotline Program alleging Grievant was stealing surplus material, namely scrap metals, from the Agency and then recycling those materials.

On May 7, 2007, Grievant's Supervisor, a member of the Virginia Tech Police Force, and a member of the Virginia Internal Audit department met with Grievant to ask him about removing scrap metals from Virginia Tech worksites. Grievant was asked the question, "Have you taken University scrap metal such as brass, copper piping and welder's lead for your personal use or gain?" Notes from the meeting show that Grievant's told the questioner:

No. If in the trash bin, he stated that he will take it. He stated that he had never taken items from the recycling bin. He said that he had taken items to the scrap dealer for others. He knows others in physical plant who sell scrap metal.

During that meeting, Grievant was informed that Virginia Tech had a policy and a departmental procedure concerning the disposal of waste and/or scrap and that all employees were to follow that policy. Grievant was advised not to be involved in such activity in the future.

The University Police received information that Grievant may have been taking materials to the Lab.¹ On June 6, 2007, the Investigator and the Lieutenant went to the Lab and observed Grievant's personal pickup truck at 9:17 a.m. At 11:07 a.m., a white State pickup truck drove into the parking lot of the Lab. Grievant was driving the white State pickup truck and Mr. O was sitting in the passenger seat. Grievant drove the State truck towards his personal pickup truck and slowed down as he approached the parked pickup truck. Mr. O threw an item from the passenger side of the State vehicle into the bed of Grievant's parked truck. The item was a 1/2" brass valve. Grievant drove the State vehicle in front of a brick building. He parked the vehicle and he and Mr. O exited the vehicle. A few minutes later, Grievant approached the Investigator and the Lieutenant and asked them what they were doing.

The Investigator told Grievant and Mr. O that he wanted to ask them some questions. He let them know that he was not going to arrest them and just wanted to give them a chance to be honest. The Investigator spoke with Grievant away from Mr. O. the Investigator asked Grievant where he had gotten the valve that was thrown into the bed of his truck. Grievant said that Mr. O had given it to him. He Investigator asked Grievant if Mr. O had brought the valve from home. Grievant said he could not say for sure where it had come from. In fact, Grievant and Mr. O had removed the valve from the Hall as part of their duties earlier in the day. The Investigator asked Grievant if Grievant would give a statement. Grievant agreed. Grievant signed and dated the following statement:

[Mr. O] give me 1/2" brass valve. I'm assuming a came from a [contractor] truck. I brought it back to my personal available at the [Lab]. [Mr. O] threw it in the back of my truck.

The Investigator and Grievant continued their conversation for another five minutes. The Investigator asked Grievant if he was telling the Investigator the truth. Grievant then said, "That valve came from [Hall]. [Mr. O] tore it out in [Hall] this morning." The Investigator asked Grievant if he would like to write another statement telling the truth. Grievant said, "Well you've already got one that says I'm a big fat liar." Grievant then gave the Investigator the following statement:

I was nervous and scared and I done a stupid thing and lied. Valve came from third-floor [Hall] mechanical room. [Mr. O] took it and give it to me when we throwed it into my truck.

¹ The Lab and the Hall are located a few miles apart.

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.”² 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.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.”

University Policy Number 3955 sets forth the Agency's policy to “effectively handle the removal of surplus material within the University.” “Surplus material is defined as personal property, including but not limited to, materials, supplies, equipment and **recyclable items**, they are determined to be surplus by the University. Surplus material does not include real property, animals or crops.” (Emphasis added).

Under University Policy number 3955, “[s]urplus material, including equipment and other fixed assets cannot be sold, loaned, given away (outside of the university) scrapped/cannibalized or disposed of by any department without prior written approval of the University Surplus Officer.” In addition, the “preferred method of disposal of surplus material is through a public auction.”

“Failure to ... comply with established written policy” is a Group II offense. Grievant acted contrary to University Policy Number 3955 because he removed a brass valve, a recyclable item, from a University Hall without obtaining prior written approval from the University Surplus Officer. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. A suspension of up to 10 workdays is appropriate upon the issuance of a Group II Written Notice. Accordingly, Grievant's five workday suspension must be upheld.

Grievant argues that the brass valve was trash and not surplus material. The definition of surplus material under the University policy, however, includes items that are recyclable. The brass valve was recyclable and Grievant was well aware of this given his regular practice of taking brass items to be recycled in return for compensation.

Grievant argues that he is not responsible because Mr. O took the valve from the University property and Mr. O threw the valve from the State vehicle into Grievant's personal vehicle. Grievant testified that he and Mr. O worked as a team and that Grievant was present at the time the brass valve was removed from the Hall. Grievant knew or should have known that Mr. O was removing surplus material. As Grievant drove himself and Mr. O in the State vehicle to Grievant's personal vehicle, Grievant

² The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

slowed the State vehicle thereby enabling Mr. O to toss the brass valve into Grievant's personal vehicle. This suggests Grievant may have known that Mr. O intended to throw the valve and Grievant's personal vehicle. Grievant took no action to undo the placement of the valve into his personal vehicle. Grievant's assertion that he was merely an unknowing observer to Mr. O's behavior is not credible.

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...."³ 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 five workday 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

³ *Va. Code § 2.2-3005.*

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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.