

Issue: Group III Written Notice (theft and falsification of documents) and Termination;
Hearing Date: 07/10/08; Decision Issued: 07/14/08; Agency: VDOT; AHO: Carl
Wilson Schmidt, Esq.; Case No. 8877; 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: 8877

Hearing Date: July 10, 2008
Decision Issued: July 14, 2008

PROCEDURAL HISTORY

On April 15, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for theft and falsification of documents.

On April 21, 2008, 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 June 3, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 10, 2008, 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 employed Grievant as an Equipment Repair Supervisor at one of its Facilities. The purpose of his position was:

Provide a high level of Customer Service. Ensure accurate input of all equipment related data into VDOT's EMS and FMS systems to make sound decisions. Prioritized the workload based on customer's requirements, parts availability, and available manpower. Assign work to equipment repair technicians, ensure they remain fully protected, and monitor and formally evaluate their performance. Ensure high-quality work is completed safely and in a timely manner. Supervise, train, and support training for assigned personnel. Promote professional certification of assigned personnel. This position is designated as essential and, as such, all duties associated with his job are required during emergency situations which may include but are not limited to inclement weather, disaster response, and emergency operations. VDOT will determine when essential positions are required.¹

Grievant supervised three technicians. Grievant was responsible for maintaining many business records for the Shop at the Facility. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

¹ Agency Exhibit 3.

Grievant wanted to replace four tires on his Personal Vehicle. A VDOT Vehicle needed for new tires due to wear and sidewall cracks. On January 30, 2008, Grievant initiated a work order to purchase four new tires size P235. This size tire fit both Grievant's vehicle and the Agency's vehicle. Grievant went to the Tire Store and purchased four new tires size P235 using his Agency issued credit card. The tires cost \$63.81 each, for a total of \$255.24. He brought the tires back to the Facility. As he was finishing his shift and leaving work, Grievant noticed that the left rear tire on his Personal Vehicle was flat. Instead of placing the new P235 size tires on the VDOT Vehicle, Grievant installed them on his Personal Vehicle. He did so using Agency equipment after finishing his shift on January 30, 2008.² Grievant drove his Personal Vehicle with the tires he paid for with State funds.

The work order indicated that the tires were mounted on the VDOT Vehicle by Grievant.

On February 29, 2008, Grievant submitted to the Agency his SPCC Statement Transmittal form regarding use of his State issued credit card. The Statement listed Grievant's purchase of four tires at the Tire Store in the amount of \$267.24. Grievant signed and dated the form just below the following statement:

By signing the Cardholder's Signature line below, I certify that all charges on this [credit card] are for official State Business and that all goods were received and accepted unless otherwise noted on the receipts.³

Grievant submitted the form to an Agency supervisor for review and approval as a customary part of his duties.

An Agency Investigator interviewed Grievant about the tires on April 2, 2008 along with several other employees.

On April 8, 2008, Grievant called the Supervisor and admitted he had taken four VDOT tires and placed them on his Personal Vehicle.

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."⁴ Group II offenses "include acts and behavior which are more severe in nature

² Grievant did not assign his labor to the installation of the tires on his Personal Vehicle.

³ Agency Exhibit 12.

⁴ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

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.”

Theft or unauthorized removal of state records, state property, or the property of other persons (including, but not limited to employees, patients, supervisors, inmates, visitors and students) is a Group III offense under DHRM Policy 1.60.

Black's Law Dictionary (5th Ed.) states that theft is "a popular name for larceny". Larceny is the wrongful or fraudulent taking of the personal goods of some intrinsic value, belonging to another, without his or her assent, and with the intention to deprive the owner thereof permanently.⁵

The four P235 tires were the property of the Commonwealth of Virginia because they were purchased by Grievant in the normal course of business, pursuant to a work order, using a State issued credit card, during work hours, and were brought back to the Agency's facility. Instead of installing them on a State vehicle, Grievant installed them on his Personal Vehicle and used them for his own benefit. Grievant engaged in theft of State property. Grievant took the tires to the Agency's Facility but then remove them without authorization when he drove his Personal Vehicle away from the Agency's Facility. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice for theft or unauthorized removal of State property, an employee may be removed by the Agency.

Grievant contends that he did not intend to keep the tires at the time he mounted them on his Personal vehicle. He contends he would have returned or replaced the tires in the following days but for the fact that he became ill and was hospitalized and remained out of work for least a month. This argument is untenable. At the time Grievant placed the tires on his Personal Vehicle, he knew or should have known he was removing the tires without authorization. Once Grievant drove his Personal Vehicle with "new State tires" on them, it was no longer possible to return "new tires" to the Agency. The tires became "used tires". The best evidence showing that Grievant did not intend to return the State tires to the Agency is the fact that he never returned them. When he subsequently sold his Personal Vehicle, the State tires were on that vehicle. Grievant ordered LT235 size tires on March 31, 2008 to replace the tires he took from the Agency. He picked up the LT235 tires on April 1, 2008 and took them to the Agency's Facility.⁶ On March 31, 2008, Grievant had been at work for several weeks yet during that time it had not occurred to him to find replacement tires for the State tires he took. He could have ordered the tires several weeks prior to March 31, 2008. He was working at the Facility on light duty until March 18, 2008. After March 18, 2008, he would have been able to physically install the replacement tires on the State vehicle, yet

⁵ See, *Skeeter v. Com.*, 217 VA 722 (1977).

⁶ The LT235 tires were not mounted on the State Vehicle when the Agency Investigator found them at the Facility on April 2, 2008.

he failed to do so. It is clear that on January 30, 2008, Grievant intended to convert for his own use the four tires he purchased with State funds. He did not intend at that time to replace the tires he took. He only later decided to replace the tires.

“Falsifying any records, including, but not limited to, vouchers, reports, insurance claims, time records, leave records, or other official state documents” constitutes a Group III offense. “Falsifying” is not defined by the Standards of Conduct, but the Hearing Officer interprets this provision to require proof of an intent to falsify by the employee in order for the falsification to rise to the level justifying termination. This interpretation is less rigorous but is consistent with the definition of “Falsify” found in Blacks Law Dictionary (6th Edition) as follows:

Falsify. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a record or document. ***

The Hearing Officer’s interpretation is also consistent with the New Webster’s Dictionary and Thesaurus which defines “falsify” as:

to alter with intent to defraud, *to falsify accounts* || to misrepresent, *to falsify an issue* || to pervert, *to falsify the course of justice*.

On February 29, 2008, Grievant signed a SPCC Statement Transmittal form regarding the purchases on his State issued credit card. Grievant had purchased four tires using this State issued credit card but mounted those tires on his Personal Vehicle. Grievant certified to the Agency that:

By signing the Cardholder’s Signature line below, I certify that all charges on this [credit card] are for official State Business and that all goods were received and accepted unless otherwise noted on the receipts.

Grievant’s certification to the Agency was false and he knew or should have known his certification was false. When Grievant removed the four tires from the Facility, the credit card charges he made were no longer for official State Business. Grievant certified that the credit card charges on his statement were for official State business when, in fact, his purchase of tires was not for official State business; it was for his personal business. Grievant falsified the SPCC Statement Transmittal form, an official State document. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for falsification of an official State document. Upon the issuance of a Group III Written Notice for falsification, the Agency may remove Grievant from employment.

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....”⁷ 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 because he was taking hydrocodone⁸ and he was ill.⁹ Grievant presented evidence that one of the side effects of hydrocodone is it makes one feel euphoric. Grievant argues that this feeling of euphoria impaired his judgment and caused him to take the tires. Grievant has not presented evidence that one of the side effects of hydrocodone is that it increases one’s likelihood of engaging in theft or for unknowingly engaging in certain behavior. The evidence is insufficient to conclude that Grievant’s medical condition materially contributed to his removal of the tires.¹⁰

Grievant argues the Agency has inconsistently applied disciplinary action. He presented the testimony of a former Resident Administrator who was “shocked” that Grievant had been removed from employment. The Resident Administrator gave the example of another employee who had stolen approximately \$1,500 yet he remained employed by the Agency. The Hearing Officer finds this evidence unpersuasive. The theft by that employee occurred sometime before July 2006 when the former Resident Administrator retired from employment. Given the amount of time that has passed since that event¹¹ and Grievant’s removal of property, there is insufficient evidence to show that the Agency’s action against Grievant was intended to single him out for discipline.

The Agency presented evidence of an aggravating factor. When Grievant was questioned by the Agency’s Investigator on April 2, 2008 about his Personal Vehicle being observed at the VDOT shop, Grievant said that in January 2008 he had

⁷ Va. Code § 2.2-3005.

⁸ Grievant had also been prescribed nitroglycerin for possible problems with his heart.

⁹ Grievant suffered an injury on January 27, 2008 and went to the hospital emergency room. He was prescribed to take and began taking hydrocodone for pain management. He was taking hydrocodone through February 1, 2008 when he became unconscious and fell in his home. He was taken to the hospital and admitted. Doctors changes his pain management at that time and it is not clear whether he continued on hydrocodone or some other medication.

¹⁰ In addition, Grievant has not established he was taking hydrocodone on February 29, 2008 when he falsified the SPCC Transmittal form.

¹¹ It is unclear when the other employee engaged in theft, but it was sometime prior to July 2006.

purchased four P235 tires for his Personal Vehicle and that he had paid approximately \$500 cash for the tires. He said he was not sure if he could locate the receipt. He told the Investigator that sometime around January 30th or January 31st or possibly February 2nd, he used the VDOT garage to mount these tires on his Personal Vehicle. On April 7, 2008, Grievant left a voice message for the Agency Investigator saying he had found the receipt for his purchase of four tires for his Personal Vehicle. These statements to the Investigator were false.¹²

In light of the standard set forth in the *Rules*, 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 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

¹² There is no reason to believe Grievant was taking hydrocodone at the time of his false statements to the Investigator.

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.¹³

[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

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.