

Issues: Group III Written Notice (theft of State property), and Termination; Hearing Date: 02/19/09; Decision Issued: 04/20/09; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9025; Outcome: No Relief – Agency Upheld In Full;

Administrative Review: AHO Reconsideration Request received 05/04/09;

Reconsideration Decision issued 05/15/09; Outcome: Original decision affirmed;

Administrative Review: EDR Ruling Request received 05/04/09; EDR Ruling #2009-2303 issued 06/18/09; Outcome: AHO's decision affirmed;

Administrative Review: DHRM Ruling Request received 05/04/09; DHRM Ruling issued 05/15/09; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9025

Hearing Date: February 19, 2009
Decision Issued: April 20, 2009

PROCEDURAL HISTORY

On September 30, 2008, Grievant was issued a Group III Written Notice of disciplinary action with removal for theft of VDOT property.

On October 20, 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 January 7, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 19, 2009, 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 a Crewmember at one of its Facilities. He had been employed by the Agency for approximately four years prior to his removal effective September 30, 2008. No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

On September 9, 2008, Grievant was working as a member of a crew assigned to patch potholes on Virginia roads. The crew passed a home with an asphalt driveway in need of repair. The homeowner saw the VDOT workers and walked down to a few of the workers. The homeowner wanted a pothole in his driveway filled. He spoke with Grievant and Mr. S. Grievant and Mr. S took asphalt from a VDOT truck and took it to the pothole on the homeowner's driveway. Grievant filled the pothole with the asphalt. The homeowner paid the two men "a couple of twenty dollar bills."

The pothole Grievant fixed on the driveway was not in the VDOT right of way. It was on private property.

On the day the Agency learned of the incident, the Superintendent spoke with several employees and Grievant. Mr. S informed the Superintendent that the money had been returned to the homeowner.

Possibly two other employees were involved in filling the pothole. When Grievant was asked to identify the two other employees, he initially said he would do so but later refused.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”¹ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

Theft or unauthorized removal of State property is a Group III offense.² Grievant took asphalt belonging to VDOT and filed a pothole on a driveway of a homeowner unaffiliated with VDOT. Grievant received compensation for assisting the homeowner. Grievant did not have authority to remove the asphalt and use it for a purpose other than in furtherance of Agency business. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for theft or unauthorized removal of State property. Upon the issuance of a Group III Written Notice, the Agency may remove Grievant from employment.

Grievant admits that the homeowner’s pothole was filled, but he contends he was not one of the people who filled the pothole. The evidence is sufficient for the Hearing Officer to conclude that Grievant was one of the employees who filled the pothole. There are several reasons to support this conclusion. First, the hearsay statements from the homeowner were not contradicted. The homeowner said he paid a couple of twenty dollar bills to two slender African American male VDOT employees after they used asphalt to fill a pothole in his driveway at the homeowner’s request. Grievant and Mr. S were the only two slender African Americans on their crew.³ Second, Crewmember C observed Grievant and Mr. S talking to the homeowner. The Flagman also observed Grievant talking to the homeowner. Third, the Superintendent asked Mr. S why he and Grievant filled a hole in a driveway and took money for doing so. Mr. S said he was not thinking properly and asked if he was going to be fired. Mr. S asked for another chance and apologized for his involvement. Mr. S did not deny that he or Grievant filled the homeowner’s pothole. Fourth, the Superintendent asked Grievant why he and Mr. S filled the homeowner’s pothole. Grievant said he didn’t know. The Superintendent asked Grievant why he would do something so stupid. Grievant responded “Don’t blame yourself, I am to blame.” The Superintendent gave Grievant several opportunities to deny filing the pothole, but Grievant did not deny it.

¹ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

² See Attachment A to DHRM Policy 1.60, Standards of Conduct.

³ Another slender African American male worked with another part of the crew that had already left the area near the homeowner’s driveway.

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....”⁴ 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 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

⁴ 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
600 East Main St. STE 301
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.⁵

[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

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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9025-R

Reconsideration Decision Issued: May 15, 2009

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

(1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

The Hearing Officer assessed the credibility of witnesses as they testified. Whether their statements were typed by another person has no bearing on the Hearing Officer’s assessment of credibility.

The evidence was overwhelming that Grievant was one of the employees who approached the Homeowner and participated in filling the Homeowner’s pot hole.

The other information Grievant provides is a restatement of his version of the facts. Several of the material facts offered by Grievant were not accurate.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

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. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer

May 15, 2009

RE: **Grievance of v. Department of Transportation**
Case No. 9025

Dear :

The agency head of the Department of Human Resource Management, Ms. Sara Redding Wilson, has asked that I respond to your request for an administrative review of the hearing officer's decision in the above referenced case. Please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

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.

In each instance where a request is made for this Agency to conduct an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent. In our opinion, your request does not identify any such policy. Rather, it appears that the issues you raised are related to what evidence the hearing officer considered and how he assessed the evidence. This Agency has no authority to intervene in evidentiary matters, so we must respectfully decline to honor your request to conduct the review. We have, however, forwarded a copy of your request to the Department of Employment Dispute Resolution for review.

Sincerely,

Ernest G. Spratley