

Issues: Hearing Date: 01/13/10; Decision Issued: 01/19/10; Agency: VDOT; AHO: Lorin A. Costanzo, Esq.; Case No. 9246; Outcome: No Relief – Agency Upheld in Full; **Administrative Review**: AHO Reconsideration Request received **02/03/10**; Reconsideration Decision issued **02/15/10**; Outcome: Original decision affirmed; **Administrative Review**: EDR Ruling Request received **02/20/10**; EDR Ruling #2010-2552, 2010-2567 issued **04/12/10**; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received **02/03/10**; EDR Ruling issued **05/27/10**; Outcome: AHO's decision affirmed.

**Commonwealth of Virginia
DEPARTMENT OF TRANSPORTATION**

DECISION OF HEARING OFFICER

In the matter of: Case No: 9246

Hearing Date: January 13, 2010
Decision Issued: January 19, 2010

APPEARANCES

Grievant's attorney
Grievant, who was also a witness
Individual
Family Member

Agency Representative at Hearing
Agency Party Representative
Engineering Technician
Assistant Regional Traffic Engineer
Engineering Technician #2
Regional Operations Director

ISSUES

Were the Grievant's actions such as to warrant disciplinary actions under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witnesses, the Hearing Officer makes the following findings of fact:

Grievant filed a timely an appeal from two Group III Written Notices issued on July 31, 2009, each of which provided for the disciplinary action in addition to issuing of the Written Notice of termination.

- A. On 7/31/09 Grievant was issued a Group III Written Notice, (Offense Dates: 7/28/09 & 7/30/09) for "Falsifying records (verbal and written) during an investigation" (Written Notice Offense Codes/Categories: 74).¹

¹ A. Tab 2.; Written Notice.

- B. On 7/31/09 Grievant was issued a Group III Written Notice (Offense Dates: Winter/Spring 2008) for "Selling property under VDOT possession for personal financial gain" (Written Notice Offense Codes/Categories 99).²

Following the failure to resolve the matters the agency head, on 10/13/09, qualified both Group III Written Notices with termination for hearing. The undersigned was appointed hearing officer effective December 16, 2009 and a grievance hearing was held on both Group III Written Notices with termination on January 13, 2010.

Grievant is an employee of Agency. He began working for Agency in 1998 as an Inspector and in 2007 he became an Engineering Technician with Agency. His job Title is Engineer Technician III and his Role Title is Preliminary Engineer.³

An agency employee made a statement that led to an investigation of whether property in the possession of Agency was sold by Grievant. This employee stated he and Grievant were riding through a site that had temporary road signs erected but no workers or construction equipment were present. As no work was being done the road signs were taken down and placed in their Agency vehicle. The employee indicated that at the Agency workplace Grievant took the signs out of the truck and Grievant sold the signs. These events were alleged to have occurred about a year prior to the initiation of the investigation.⁴

Grievant signed two typewritten documents concerning matters related to the investigation. Meetings were held with Grievant to discuss the investigation. Agency prepared one typewritten statement to document Grievant's statements and certain events. This statement was signed and dated 7/28/09. Grievant signed indicating, "By signing below, I attest and consent that the information I have provided above is factual and accurate as written."

A second typewritten statement was signed by Grievant at a meeting held on July 30, 2009. This statement was prepared by Agency documenting statements about the events and statements concerning auctions. This document was signed by Grievant on 7/30/09 and also indicated, "By signing below, I attest and consent that the information I have provided above is factual and accurate as written."⁵

Grievant signed two handwritten statements dated 7/31/09. In one of these statements Grievant indicated he did not call certain auction companies on the day he said he did in his 7/30/09 statement. His written statement further indicated "Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records; however, those are the only statements or records that are incorrect and exaggerated. All other information provided me is completely accurate and true."

In Grievant's subsequent handwritten signed statement dated 7/31/09 Grievant indicated he did not get stopped by police on the evening of April 16, 2009 as he had stated in the typewritten statement dated 7/28/09. In that signed statement Grievant had indicated he was pulled over on 4/16/09 by a police officer for speeding. He said he provided his license and registration and was given a verbal warning. Grievant then indicated that later, when he began

² A. Tab 2 Written Notice.

³ A. Tab 1, Grievance Form A.; A. Tab 5.

⁴ A. Tab 5.

⁵ A. Tab 5.

to replace the items he pulled out of his glove box when he was searching for his registration, he discovered auction tickets and a receipt for the signs. Also in the typewritten statement of 7/30/09 Grievant had indicated he called Police Chief and was informed that because it was a simple verbal warning they would not have a record of the stop and there would be no record of his license or plate being checked or of his vehicle being stopped by one of their officers.

Grievant's second statement made on 7/31/09 stated, "I did not get stopped on the evening of April 16, 2009 as I previously stated in written statements. Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records. Further, my call to _____ (***name provided in statement is redacted herein***) on April 17, 2009 while made did not provide the information I have found the auction receipts the previous day. I actually found the tickets over the course of the weekend."

BURDEN OF PROOF

In disciplinary actions the burden of proof is on the Agency to show by a preponderance of the evidence that the disciplinary action taken was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the facts de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct, (iii) 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) and, finally, (iv) 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."⁶

A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.⁷

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 *et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code Section 2.2-3000(A) sets forth the Virginia grievance procedure and provides, in part:

"It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes

⁶ §VI.B. of the Rules for Conducting Grievance Hearings.

⁷ Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8 and 9.

which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

To establish procedures on standards of conduct and performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Human Resources Management promulgated the *Standards of Conduct*, Policy No. 1.60. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The *Standards of Conduct* serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct, and to provide appropriate corrective action.

The *Standards of Conduct* provides that Group III offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination/discharge. Group III offenses include falsification of records and the unauthorized removal of state property. The *Standards of Conduct* further provides that the examples offenses set forth are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Any offense that in the judgment of agency heads, undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of Policy 1.60.⁸

VDOT has policy in place concerning taking possession, using, selling, or disposing of property. VDOT, Asset Management Division, DISPOSAL OF MATERIALS, AMD Number 1.02 provides, "VDOT employees may not take possession, use, sell or dispose of state-owned materials of any kind for personal gain." Additionally it provides, "All materials picked up from the roadway system by VDOT employees are considered as State-owned unless deemed to be the property of a private owner". Additionally, the policy provides that "Violation of this directive will subject the employee to the Standards of Conduct."⁹

Allegation: Selling property under VDOT possession for personal financial gain.

Engineering Technician ("Eng. Tech.") spoke to an Agency employee of an incident of work zone signs going missing from his Agency vehicle and Grievant, prior to the fact, discussing the signs were going to be sold and after the fact saying the signs were sold.

Eng. Tech. testified that in January of 2009, while "pushed to a breaking point", he made the statement concerning signs to another Agency employee . He indicated he did not choose to come forward to make this statement; it was an accident. He did not want to speak out about the matters discussed but it slipped out when he was venting/ranting. The individual he vented to informed management of the situation concerning work zone signs going missing.

There was an Agency concern that work zone signs being up and on display with no work being done can create a safety issue and may cause motorists to ignore work zone signs in the future. It is a practice that when work zone signs are observed to be up when work is not actually being done steps would be taken. The signs would be taken down, put over a bank, or even picked up and take back to the district office.

At issue are work zone signs described as orange fabric roll up work zone signs and their

⁸ A Tab 4.

⁹ A Tab 4.

spring loaded sign stands. The signs were observed to be up and on display at a site where no work was going on.

Eng. Tech. indicated the signs were picked up, transported back to the Agency site, and Grievant took and sold the signs. Eng. Tech. further contended that:

- Grievant and Eng. Tech. picked up the signs and brought them back to the district office in Eng. Tech.'s truck.
- Grievant talked about the possibility of selling these signs while in route to the district office.
- At his Agency office Eng. Tech. looked out his office window and saw Grievant removing something from the truck. The signs were in his truck and then were not there.
- A few weeks later Grievant said to him the signs were gone and were sold.

Grievant indicated that the signs were folded and left at the work site. Grievant further contended that:

- He did not put the signs and stands from the road into his personal vehicle and sell them.
- He did sell signs and stands to an individual but he purchased those signs and stands from an estate auction but could not recall where or when the auction took place.
- Two receipts, one for the signs & stands were located from the auction where he contends the purchase occurred.

There is conflict between versions of events as related by Eng. Tech. and Grievant. It is not contested that Grievant sold signs. However, Grievant contends that the signs were purchased at auction. Grievant's Witnesses testified he had purchased signs from Grievant in June of 2007 and that Grievant had told him the signs were purchased at auction.

Eng. Tech. testified he did not see Grievant with the signs in his hand but did see him moving around his Eng. Tech's state truck. Eng. Tech. saw Grievant going between the two vehicles, his and Grievant's. It was twilight and getting dark when this occurred. He testified that the signs were there, and then were not there. Eng. Tech. did not know with 100% certainty who the signs were sold to but the day the signs were picked up a specific individual's name was mentioned by Grievant to him.

Agency's Report of Investigation concluded that:

1. Grievant and Eng. Tech. agreed they passed through a closed work zone and saw signs and stands left by a contractor.
2. Eng. Tech. reported that Grievant took the signs and stands and sold them.
3. Grievant stated that Eng. Tech. and Grievant folded eight signs and stands and left them on the shoulder of the road.

4. Grievant acknowledged selling eight signs and stands to an individual however he indicated he purchased the signs and stands at an auction.
5. Grievant could not recall when and where he purchased the signs and stands but he provided receipts for the signs & stands and for lumber purchased.
6. Validity of the receipts could not be verified.¹⁰

The Agency presented evidence as to their taking into consideration prior instances of dealings with both Eng. Tech. and Grievant. Prior incidents were considered wherein Eng. Tech. and Grievant separately were involved in matters concerning problems and how each acted. Agency presented evidence concerning prior incidents where there were discrepancies between what was said by Grievant and what was said by others concerning matters on the job.

Agency management sought follow up review of the events after the investigation of the office of the Inspector General. Both Eng. Tech. and Grievant statements were further investigated. Follow up interviews were conducted and concern was expressed over the auction tickets and other problems that began to appear.

During the follow up investigations the issues of false statements & documents came up. Grievant's first admission as to making false statements (oral and written) addressed his contacting auction companies (referenced in his 7/30/09 written statement). Grievant indicated in the 7/31/09 statement addressing his false statements that "All other information provided me is completely accurate and correct." There were, however, at this time, Agency concerns over Grievant's statements about the law enforcement stop on the evening of April 16, 2009. Grievant had contended this stop led to discovery of the auction receipts in his glove compartment. In a subsequent written statement of Grievant on 7/31/09 he admitted to his falsifying statements as to his vehicle being stop by law enforcement.¹¹

Agency gave consideration to the credibility of the parties in determining matters and its course of action. Credibility is a consideration in this cause. Grievant does not contest that he sold signs to an individual however he contends the signs sold were signs that he purchased at an auction. Grievant produced two receipts and what appears to be an adding machine ribbon showing the addition of 55 and 25 x .05 totaling 84.

The auction receipt for "signs and stands" produced by Grievant appears to be a form receipt with lines. It shows no identification of seller, auctioneer, location of auction, date of auction, or any other identifiable information other than the number "185" on a line next to "Buyer's Name or Number". Also, the adding machine ribbon shows no identification of seller, auctioneer, location, date, or any other identifiable information. Agency investigation report was not able to verify the receipts. Grievant was not able to recollect the place of the auction, its date, or who conducted the auction.

The Agency investigation report stated that the individual who purchased the signs and stands indicated Grievant told him that Grievant had purchased road signs and stands at a yard sale.¹²

Grievant indicated in his signed statement of 7/28/09 that he received approximately \$400 for the signs he sold. Investigators interviewed the individual on 4/16/09 that had purchased

¹⁰ A Tab 5-Report of Investigation.

¹¹ Tab 5 page 13 & 14 and Testimony.

¹² Tab 5.

signs from Grievant. The report stated the individual indicated he purchased signs and stands for around \$100 and he could not be sure about the exact price he paid.¹³

Additional facts and the statements of Grievant made during the investigation and relating to the auction, auction receipts, and falsifying records are discussed below. These matters are taken into consideration in this matter and in affording weight to be given the evidence in this cause.

The burden of proof, discussed above, is also a consideration in this matter.

Allegation: Falsifying records (verbal and written) during an investigation.

Grievant signed written statements indicating that he falsified records, verbal and written, during the investigation. During the Agency's investigation meetings held with Grievant were summarized in writing, reviewed, and signed by Grievant. Two written statements dated 7/28/09 and 7/30/09 were presented in this case. Both written documents contained the statement, "By signing below, I attest and consent that the information I have provided above is factual and accurate as written."

On 7/28/09, during the Agency Investigation, Grievant signed a typed statement which was prepared by Agency. Included within the written statement was the following:

{note: names were set forth in Grievant's signed statement but such names are redacted below}

"On April 16, 2009, _____ (***name redacted***) met with _____ (***Grievant's name redacted***) to question him about the events associated with her investigation. Later that evening while on his way to [an agency], _____ (***Grievant's name redacted***) was pulled over by a Town of Dublin police officer for speeding. He provided his license and registration to the officer and was given a verbal warning. He cannot remember if the officer returned to his patrol car to run a check on his license plates and/or registration. He believes he did not return to his car to do this. After class, _____ (***Grievant's initials redacted herein***) began to replace the items he pulled out of his glove box when he was searching for his registration. As he was placing items back in the glove box, he discovered the auction tickets and receipt he paid for the signs in with the glove box items such as game hunting tickets and food receipts."¹⁴

On 7/30/09, during the Agency Investigation of selling of property which was in possession of Agency, Grievant signed a second typed statement prepared by Agency. This document stated that Grievant contacted several auction companies named in the document to ask how they do advertising and indicated that Grievant spoke with a number of individuals and companies. The statement provided details within the statement as to one individual refusing to go back and look for receipts.¹⁵

Grievant subsequently admitted in two separate written statements which Grievant signed

¹³ Tab 5.

¹⁴ A Tab 5, page 8- statement.

¹⁵ A Tab 5, page 10-statement.

and which were dated 7/31/09 that he falsified statements previously given to investigators. Grievant stated, "Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records...."¹⁶

Grievant, in a hand written document which he signed dated 7/31/09 stated, "I did not call the auction companies of __, __, and __ (*names provided in written statement but redacted herein*) on the day I said I called them in my written statement of July 30, 2009. Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records; however, those are the only statements or records that are incorrect and exaggerated. All other information provided me is completely accurate and true."

Grievant in a written and signed statement of 7/31/09 stated, "I did not get stopped on the evening of April 16, 2009 as I previously stated in written statements. Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records Further, my call to _____ (*name provided in written statement but redacted herein*) on April 17, 2009, while made did not provide the information I have found the auction receipts the previous day. I actually found the tickets over the course of the weekend."

The documents of 7/28/09 and 7/30/09 were signed as part of the Agency investigation into matters and constitute records which were falsified. As stated therein these documents were signed attesting and consenting that the information Grievant had provided was factual and accurate as written. These documents confirmed statements and events discussed by Grievant and Agency during the investigation.

Conclusions:

A. Falsifying records (verbal and written) during an investigation:

Reviewing the facts de novo (afresh and independently, as if no determination had yet been made) it is determined, for the reasons stated above, that Agency has proven by a preponderance of the evidence that (i) Grievant engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, (iii) the Agency's discipline was consistent with law and policy, and (iv.) there are not mitigating circumstances justifying a reduction or removal of the disciplinary action.

The disciplinary action of issuing a Group III Written Notice with termination for "Falsifying records (verbal and written) during an investigation" was warranted and appropriate under the circumstances.

B. Selling property under VDOT possession for personal financial gain:

Reviewing the facts de novo (afresh and independently, as if no determination had yet been made) it is determined, for the reasons stated above, that Agency has proven by a preponderance of the evidence that (i) Grievant engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, (iii) the Agency's discipline was consistent with law and policy, and (iv.) there are not mitigating circumstances justifying a reduction or removal of the disciplinary action.

¹⁶ A Tab 5, page 13- statement and A Tab 5, page 14, statement.

The disciplinary action of issuing a Group III Written Notice with termination for "Selling property under VDOT possession for personal financial gain" was warranted and appropriate under the circumstances.

Mitigation

Group III Offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination/dismissal. Under the *Rules for Conducting Grievance Hearings*, Section VI. B.1., 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. The Agency's discipline is not found to exceed the limits of reasonableness.

DECISION

A. For the reasons stated herein, the Agency's issuance to the Grievant on 7/31/09 of a Group III Written Notice, with termination for "Falsifying records (verbal and written) during an investigation" is hereby UPHeld.

B. For the reasons stated herein, the Agency's issuance to the Grievant on 7/31/09 of a Group III Written Notice, with termination for "Selling property under VDOT possession for personal financial gain" is hereby UPHeld.

APPEAL RIGHTS

You may file an Administrative review request within **15 calendar days** from the date the decision was issued.

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review:

This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions are the basis for such a request.

2. A challenge that the hearing decision is inconsistent with State or agency policy is made to the Director of the Department of Human Resources Management. This request must

cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to: Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219.

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to: Director, Department of Employment Dispute Resolution, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar days** of the date of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

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. You must give a copy of your notice of appeal the Director of the Department of Employment Dispute Resolution.

Lorin A. Costanzo, Hearing Officer

Commonwealth of Virginia
DEPARTMENT OF TRANSPORTATION

DECISION ON
REQUEST TO RECONSIDER OR REOPEN

In the matter of: Case No: 9246-R

Decision on Request to Reconsider or Issued: February 15, 2010

§ 7.2(a) of the Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual* states,

"A hearing officer's original decision is subject to three types of administrative review. A party may make more than one type of request for review. However, all requests for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. Requests may be initiated by electronic means such as facsimile or e-mail. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests must be provided to the other party and to the EDR Director."

A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.¹⁷ 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.

On January 19, 2010, a decision was issued by the hearing officer in this cause. By e-mail dated February 3, 2010, Grievant timely filed a "REQUEST TO RECONSIDER DECISION OR REOPEN HEARING".

Grievant's request to reconsider decision or reopen contends "a major error of fact". He presents that there were two different times Grievant and Eng. Tech had seen abandoned workplace signs while together. Grievant cites the statement in the decision that, "Grievant indicated that the signs were folded and left at the worksite". Grievant requests a reconsideration of the decision and a rehearing on the issue of the specific time frame in which he is accused of taking and selling signs. Grievant further stated that it is Grievant's understanding that all parties agree that no theft occurred in December of 2007.

Consideration was given by the Hearing Officer to the evidence admitted at the hearing in arriving at the decision in this cause. When work zone signs are observed to be up in an inactive

¹⁷ § 7.2(a) of the Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*

work site it is the practice of Agency to take action. Generally, the first time this is observed, the signs are laid down in a ditch or on the side of the road. The second time work signs are observed up in an inactive work site the signs are either picked up or laid down farther away. On the third time, the signs are picked up and taken back to Agency. The procedure is for removal of work signs after being observed up in an inactive work site more than once. Removal occurs generally on the third observation or, sometimes, on the second observation, but not on a first observation.

Without discussing herein all conflicts of evidence and all evidence admitted at hearing, it is noted that evidence was presented at hearing that:

- a.) work signs were removed and taken back to Agency,
- b.) the removed work signs were taken by Grievant and sold,
- c.) Grievant made statements that the signs and stands had been sold, and
- d.) Grievant stated he did not put the signs and stands into his personal vehicle, and sell them.¹⁸

The "Office of the Inspector General Investigation Division, Report of Investigation", was admitted into evidence in this case. This *Report* indicates conflicting statements between Grievant and Eng. Tech. This *Report* states in pertinent part:

"The Investigation Division received information that [Grievant] took signs and stands left by a contractor at a closed work zone and sold them to a contractor.

Our investigation revealed that both [Grievant] and [Eng. Tech.] agree that they passed through a closed work zone and saw signs and stands that had been left by a contractor. [Eng Tech.] stated that [Grievant] took the signs and stands and sold them to _____. [*name redacted herein*]

[Grievant] stated that he and [Eng. Tech] folded eight signs and stands and left them on the shoulder of the road." {emphasis added}¹⁹

The decision in this cause discussed, among other matters, the burden of proof and a conflict of evidence between Eng. Tech. and Grievant. The Hearing Officer is charged with giving consideration to the evidence admitted at the hearing in arriving at a decision. In disciplinary actions the Hearing Officer reviews the facts *de novo* to determine whether the actions constituted misconduct and whether the agency has established by a preponderance of the evidence that the action taken by agency was both warranted and appropriate under all the facts and circumstances. *Grievance Procedure Manual* §5.8.

The Hearing Officer is to consider the totality of the evidence admitted at hearing. The Hearing Officer has authority to weigh the evidence and determine witness credibility. Where the evidence conflicts or is subject to varying interpretations the Hearing Officer has the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact.

In his request to reconsider or reopen Grievant has not offered any probative newly

¹⁸ Testimony and Agency Exhibit Tab 5, Agreed Exhibit and Report of Investigation.

¹⁹ Agency Exhibit Tab 5.

discovered evidence nor has Grievant presented probative evidence of any incorrect legal conclusion by the hearing officer.

It is further noted that the decision in this cause addresses two Group III Written Notices issued on July 31, 2009. One Group III Written Notice with termination was issued for "Selling property under VDOT possession for personal financial gain" and this Written Notice (with termination) was upheld. A second Group III Written Notice with termination was issued for "Falsifying Records" (verbal and written) during an investigation" and this Written Notice (with termination) was also upheld. The "REQUEST TO RECONSIDER DECISION OR REOPEN HEARING" addresses the Group III Written Notice with termination for "Selling property under VDOT possession for personal financial gain". The "REQUEST TO RECONSIDER DECISION OR REOPEN HEARING" does not address matters related to the Group III Written Notice with termination issued for "Falsifying Records" (verbal and written) during an investigation".

For the reasons stated above, Grievant's "REQUEST TO RECONSIDER DECISION OR REOPEN HEARING" 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.

Lorin A. Costanzo, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Transportation

May 27, 2010

The grievant, through his representative, has requested that the Department of Human Resource Management conduct an administrative review of the hearing officer's decision in Case No. 9246. For the reason stated below, this Department will not disturb the decision. The agency head, Ms. Sara Redding Wilson, has asked that I respond to this appeal.

FACTS

The facts as set forth by the hearing officer in his **Finding of Facts**, in part, are as follows:

Grievant is an employee of the Agency. He began working for Agency in 1998 as an Inspector and in 2007 he became an Engineering Technician with Agency. His job Title is Engineer Technician III and his Role Title is Preliminary Engineer. An agency employee made a statement that led to an investigation of whether property in the possession of Agency was sold by Grievant. This employee stated he and Grievant were riding through a site that had temporary road signs erected but no workers or construction equipment were present. As no work was being done the road signs were taken down and placed in their Agency vehicle. The employee indicated that at the Agency workplace Grievant took the signs out of the truck and Grievant sold the signs. These events were alleged to have occurred about a year prior to the initiation of the investigation.

Grievant signed two typewritten documents concerning matters related to the investigation. Meetings were held with Grievant to discuss the investigation. Agency prepared one typewritten statement to document Grievant's statements and certain events. This statement was signed and dated 7/28/09. Grievant signed indicating, "By signing below, I attest and consent that the information I have provided above is factual and accurate as written."

A second typewritten statement was signed by Grievant at a meeting held on July 30, 2009. This statement was prepared by Agency documenting statements about the events and statements concerning auctions. This document was signed by Grievant on 7/30/09 and also indicated, "By signing below, I attest and consent that the information I have provided above is factual and accurate as written." Grievant signed two handwritten statements dated 7/31/09. In one of these statements Grievant indicated he did not call certain auction companies on the day he said he did in his 7/30/09 statement. His written statement further indicated

“Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records; however, those are the only statements or records that are incorrect and exaggerated. All other information provided me is completely accurate and true.”

In Grievant’s subsequent handwritten signed statement dated 7/31/09 Grievant indicated he did not get stopped by police on the evening of April 16, 2009 as he had stated in the typewritten statement dated 7/28/09. In that signed statement Grievant had indicated he was pulled over on 4/16/09 by a police officer for speeding. He said he provided his license and registration and was given a verbal warning. Grievant then indicated that later, when he began to replace the items he pulled out of his glove box when he was searching for his registration, he discovered auction tickets and a receipt for the signs. Also, in the typewritten statement of 7/30/09, Grievant had indicated he called the Police Chief and was informed that because it was a simple verbal warning they would not have a record of the stop and there would be no record of his license or plate being checked or of his vehicle being stopped by one of their officers.

Grievant's second statement made on 7/31/09 stated, “I did not get stopped on the evening of April 16, 2009 as I previously stated in written statements. Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records. Further, my call to ____ (*name provided in statement is redacted herein*) on April 17, 2009 while made did not provide the information I have found the auction receipts the previous day. I actually found the tickets over the course of the weekend.”

In his decision, Applicable Law and Decision, the hearing officer continued:

VDOT has policy in place concerning taking possession, using, selling, or disposing of property. VDOT, Asset Management Division, DISPOSAL OF MATERIALS, AMD Number 1.02 provides, "VDOT employees may not take possession, use, sell or dispose of state-owned materials of any kind for personal gain." Additionally it provides, "All materials picked up from the roadway system by VDOT employees are considered as State-owned unless deemed to be the property of a private owner". Additionally, the policy provides that "Violation of this directive will subject the employee to the Standards of Conduct.

Allegation: Selling property under VDOT possession for personal financial gain.

Engineering Technician ("Eng. Tech.") spoke to an Agency employee of an incident of work zone signs going missing from his Agency vehicle and Grievant, prior to the fact, discussing the signs were going to be sold and after the fact saying the signs were sold.

Eng. Tech. testified that in January of 2009, while "pushed to a breaking point", he made the statement concerning signs to another Agency employee. He indicated he did not choose to come forward to make this statement; it was an accident. He did not want to speak out about the matters discussed but it slipped out when he was venting/ranting. The individual he vented to informed management of the situation concerning work zone signs going missing.

There was an Agency concern that work zone signs being up and on display with no work being done can create a safety issue and may cause motorists to ignore work zone signs in the future. It is a practice that when work zone signs are observed to be up when work is not actually being done steps would be taken. The signs would be taken down, put over a bank, or even picked up and take back to the district office.

At issue are work zone signs described as orange fabric roll up work zone signs and their spring loaded sign stands. The signs were observed to be up and on display at a site where no work was going on.

Eng. Tech. indicated the signs were picked up, transported back to the Agency site, and Grievant took and sold the signs. Eng. Tech. further contended that:

- Grievant and Eng. Tech. picked up the signs and brought them back to the district office in Eng. Tech.'s truck.
- Grievant talked about the possibility of selling these signs while in route to the district office.
- At his Agency office Eng. Tech. looked out his office window and saw Grievant removing something from the truck. The signs were in his truck and then were not there.
- A few weeks later Grievant said to him the signs were gone and were sold.

Grievant indicated that the signs were folded and left at the work site. Grievant further contended that:

- He did not put the signs and stands from the road into his personal vehicle and sell them.
- He did sell signs and stands to an individual but he purchased those signs and stands from an estate auction but could not recall where or when the auction took place.
- Two receipts, one for the signs & stands were located from the auction where he contends the purchase occurred.

There is conflict between versions of events as related by Eng. Tech. and Grievant. It is not contested that Grievant sold signs. However, Grievant contends that the signs were purchased at auction. Grievant's Witnesses testified he had purchased signs from Grievant in June of 2007 and that Grievant had told him the signs were purchased at auction.

Eng. Tech. testified he did not see Grievant with the signs in his hand but did see him moving around his Eng. Tech's state truck. Eng. Tech. saw Grievant going between the two vehicles, his and Grievant's. It was twilight and getting dark when this occurred. He testified that the signs were there, and then were not there. Eng. Tech. did not know with 100% certainty who the signs were sold to but the day the signs were picked up a specific individual's name was mentioned by Grievant to him.

Agency's Report of Investigation concluded that:

1. Grievant and Eng. Tech. agreed they passed through a closed work zone and saw signs and stands left by a contractor.
2. Eng. Tech. reported that Grievant took the signs and stands and sold them.
3. Grievant stated that Eng. Tech. and Grievant folded eight signs and stands and left them on the shoulder of the road.
4. Grievant acknowledged selling eight signs and stands to an individual however he indicated he purchased the signs and stands at an auction.
5. Grievant could not recall when and where he purchased the signs and stands but he provided receipts for the signs & stands and for lumber purchased.
6. Validity of the receipts could not be verified.

The Agency presented evidence as to their taking into consideration prior instances of dealings with both Eng. Tech. and Grievant. Prior incidents were considered wherein Eng. Tech. and Grievant separately were involved in matters concerning problems and how each acted. Agency presented evidence concerning prior incidents where there were discrepancies between what was said by Grievant and what was said by others concerning matters on the job.

Agency management sought follow up review of the events after the investigation of the office of the Inspector General. Both Eng. Tech. and Grievant statements were further investigated. Follow up interviews were conducted and concern was expressed over the auction tickets and other problems that began to appear.

During the follow up investigations the issues of false statements & documents came up. Grievant's first admission as to making false statements (oral and written) addressed his contacting auction companies (referenced in his 7/30/09 written statement). Grievant indicated in the 7/31/09 statement addressing his false statements that "All other information provided me is completely accurate and correct." There were, however, at this time, Agency concerns over Grievant's statements about the law enforcement stop on the evening of April 16, 2009. Grievant had contended this stop led to discovery of the auction receipts in his glove compartment. In a subsequent written statement of Grievant on 7/31/09 he admitted to his falsifying statements as to his vehicle being stopped by law enforcement.

Agency gave consideration to the credibility of the parties in determining matters and its course of action. Credibility is a consideration in this cause. Grievant does not contest that he sold signs to an individual however he contends the signs sold were signs that he purchased at an auction. Grievant produced two receipts and what appears to be an adding machine ribbon showing the addition of 55 and 25 x .05 totaling 84.

The auction receipt for "signs and stands" produced by Grievant appears to be a form receipt with lines. It shows no identification of seller, auctioneer, location of auction, date of auction, or any other identifiable information other than the number "185" on a line next to "Buyer's Name or Number". Also, the adding machine ribbon shows no identification of seller, auctioneer, location, date, or any other identifiable information. Agency investigation report was not able to verify the receipts. Grievant was not able to recollect the place of the auction, it's date, or who conducted the auction.

The Agency investigation report stated that the individual who purchased the signs and stands indicated Grievant told him that Grievant had purchased road signs and stands at a yard sale.

Grievant indicated in his signed statement of 7/28/09 that he received approximately \$400 for the signs he sold. Investigators interviewed the individual on 4/16/09 that had purchased signs from Grievant. The report stated the individual indicated he purchased signs and stands for around \$100 and he could not be sure about the exact price he paid.

Additional facts and the statements of Grievant made during the investigation and relating to the auction, auction receipts, and falsifying records are discussed below. These matters are taken into consideration in this matter and in affording weight to be given the evidence in this cause.

The burden of proof, discussed above, is also a consideration in this matter.

Allegation: Falsifying records (verbal and written) during an investigation.

Grievant signed written statements indicating that he falsified records, verbal and written, during the investigation. During the Agency's investigation meetings held with Grievant were summarized in writing, reviewed, and signed by Grievant. Two written statements dated 7/28/09 and 7/30/09 were presented in this case. Both written documents contained the statement, "By signing below, I attest and consent that the information I have provided above is factual and accurate as written."

On 7/28/09, during the Agency Investigation, Grievant signed a typed statement which was prepared by Agency. Included within the written statement was the following:

{note: names were set forth in Grievant's signed statement but such names are redacted below}

“On April 16, 2009, _____ (*name redacted*) met with _____ (*Grievant's name redacted*) to question him about the events associated with her investigation. Later that evening while on his way to [an agency], _____ (*Grievant's name redacted*) was pulled over by a Town of Dublin police officer for speeding. He provided his license and registration to the officer and was given a verbal warning. He cannot remember if the officer returned to his patrol car to run a check on his license plates and/or registration. He believes he did not return to his car to do this. After class, _____ (*Grievant's initials redacted herein*) began to replace the items he pulled out of his glove box when he was searching for his registration. As he was placing items back in the glove box, he discovered the auction tickets and receipt he paid for the signs in with the glove box items such as game hunting tickets and food receipts.”

On 7/30/09, during the Agency Investigation of selling of property which was in possession of Agency, Grievant signed a second typed statement prepared by Agency. This document stated that Grievant contacted several auction companies named in the document to ask how they do advertising and indicated that Grievant spoke with a number of individuals and companies. The statement provided details within the statement as to one individual refusing to go back and look for receipts. Grievant subsequently admitted in two separate written statements which Grievant signed and which were dated 7/31/09 that he falsified statements previously given to investigators. Grievant stated, “Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records....”

Grievant, in a hand written document which he signed dated 7/31/09 stated, “I did not call the auction companies of _____, _____, and _____ (*names provided in written statement but redacted herein*) on the day I said I called them in my written statement of July 30, 2009. Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records; however, those are the only statements or records that are incorrect and exaggerated. All other information provided me is completely accurate and true.”

Grievant in a written and signed statement of 7/31/09 stated, “I did not get stopped on the evening of April 16, 2009 as I previously stated in written statements. Therefore, I admit to falsifying statements in this regard and documenting those statements in investigating records Further, my call to _____ (*name provided in written statement but redacted herein*) on April 17, 2009, while made did not provide the information I have found the auction receipts the previous day. I actually found the tickets over the course of the weekend.”

The documents of 7/28/09 and 7/30/09 were signed as part of the Agency

investigation into matters and constitute records which were falsified. As stated therein these documents were signed attesting and consenting that the information Grievant had provided was factual and accurate as written. These documents confirmed statements and events discussed by Grievant and Agency during the investigation.

Conclusions

A. Falsifying records (verbal and written) during an investigation:

Reviewing the facts de novo (afresh and independently, as if no determination had yet been made) it is determined, for the reasons stated above, that Agency has proven by a preponderance of the evidence that (i) Grievant engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, (iii) the Agency's discipline was consistent with law and policy, and (iv.) there are not mitigating circumstances justifying a reduction or removal of the disciplinary action. The disciplinary action of issuing a Group III Written Notice with termination for "Falsifying records (verbal and written) during an investigation" was warranted and appropriate under the circumstances.

B. Selling property under VDOT possession for personal financial gain:

Reviewing the facts de novo (afresh and independently, as if no determination had yet been made) it is determined, for the reasons stated above, that Agency has proven by a preponderance of the evidence that (i) Grievant engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, (iii) the Agency's discipline was consistent with law and policy, and (iv.) there are not mitigating circumstances justifying a reduction or removal of the disciplinary action. The disciplinary action of issuing a Group III Written Notice with termination for "Selling property under VDOT possession for personal financial gain" was warranted and appropriate under the circumstances.

Mitigation

Group III Offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination/dismissal. Under the *Rules for Conducting Grievance Hearings*, Section VI. B.1., 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. The Agency's discipline is not found to exceed the limits of reasonableness.

DECISION

A. For the reasons stated herein, the Agency's issuance to the Grievant on 7/31/09

Grievant of a Group III Written Notice, with termination for “Falsifying records (verbal and written) during an investigation” is hereby UPHeld.

B. For the reasons stated herein, the Agency's issuance to the Grievant on 7/31/09 of a Group III Written Notice, with termination for “Selling property under VDOT possession for personal financial gain” is hereby UPHeld.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action exceeds the limits of reasonableness, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and/or procedure.

The relevant policy, the Department of Human Resource Management's Policy No. 1.60, Standards of Conduct, states, “It is the policy of the Commonwealth to promote the well-being of its employees in the workplace by maintaining high standards of work performance and professional conduct.” The policy states as its purpose, “The purpose of the policy is to set forth the Commonwealth's Standards of Conduct and the disciplinary process that agencies must utilize to address unacceptable behavior, conduct, and related employment problems in the workplace, or outside the workplace when conduct impacts an employee's ability to do his/her job and/or influences the agency's overall effectiveness.” Attachment A, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. These examples are not all-inclusive. In addition, VDOT has policy in place concerning taking possession, using, selling, or disposing of property. VDOT, Asset Management Division, DISPOSAL OF MATERIALS, AMD Number 1.02 provides, "VDOT employees may not take possession, use, sell or dispose of state-owned materials of any kind for personal gain." Additionally it provides, "All materials picked up from the roadway system by VDOT employees are considered as State-owned unless deemed to be the property of a private owner". Additionally, the policy provides that "Violation of this directive will subject the employee to the Standards of Conduct.

The grievant is challenging the hearing officer's decision on a singular issue- the hearing officer's classification of the statements signed by the grievant as “official records” or “records” as being within the meaning of Written Offense Code 74 “Falsifying Records” as a Group III offense. It is the opinion of the DHRM that the hearing officer is correct in his analysis and interpretation of the policy regarding the definition. Based on the evidence, it is clear the “records” referred to here (signed statements by the grievant) were a part of an official

investigation conducted by the agency related to theft of private property under the control of VDOT employees. Therefore, the hearing officer's classification of the signed statements as "official records" and "records" was appropriate. In addition, the proper disciplinary action for falsifying official records is a Group III Written Notice.

We do not find that the hearing officer's decision was inconsistent with policy and will not interfere with the application of the hearing decision.

Ernest G. Spratley