

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 12/22/10; Decision Issued: 12/27/10; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9461; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9461**

Hearing Date: December 22, 2010  
Decision Issued: December 27, 2010

**PROCEDURAL HISTORY**

On October 6, 2010, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance. The Agency originally issued a Group II Written Notice with suspension but replaced that written notice with a Group I Written Notice.

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 November 30, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 22, 2010, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?

2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

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

The Virginia Department of Transportation employs Grievant as a Transportation Operational Manager III at one of its facilities. No evidence of prior active disciplinary action against Grievant was introduced during the Hearing. The purpose of this position was:

To coordinate and direct all maintenance and State Force construction activities in the [Residency] in order to accomplish work required to maintain a safe and efficient transportation system.

One of Grievant's Core responsibilities as expressed in his Employee Work Profile was:

Provide technical guidance to Superintendents, ensuring policies, procedures, and established techniques for maintenance and state force construction are adhered to.<sup>1</sup>

On May 8, 2009, Grievant signed an addendum to his Employee Work Profile adding a Core Responsibility:

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<sup>1</sup> Agency Exhibit 4.

Support the intent of Executive Order 33 (2006) and the goals of the Agency Procurement Plan when making vendor sourcing decisions for goods and services.

A Measure for this Core Responsibility was:

Follow the “set aside” policy as indicated in [Executive Order 33] and in the VDOT SWaM plan, by soliciting vendor quotes, documenting and making awards in compliance with the [Division of Purchases and Supplies] Agency Procurement and Surplus Property manual.

The Department of General Services, Division of Purchases and Supply sets forth the Agency Procurement and Surplus Property Manual for State agencies to use when purchasing goods and services. Section 2.1(a), Mandatory Sources, provides, in part:

Term Contracts. To provide more favorable prices through volume purchasing and to reduce lead-time in administrative cost and effort, DGS/DPS and other agencies/institutions with their delegated authority, may establish mandatory use term contracts for goods or services. Written notice of contract awards are used notifying participants (agencies or institutions organizational elements within) of the existence of such contracts. In accordance with the terms and conditions, purchase orders shall be issued in any amount for any goods or services on a term contract available to that participant. Agencies and institutions shall place all orders on mandatory use contracts through eVA. If an item is available on a mandatory contract, participants may not use their local purchasing authority to purchase from other another source unless the purchase is exempt by contract terms such as not meeting the contract’s minimum order requirement. Vendors who intentionally sell or attempt to sell goods or services to an authorized participant who is under a mandatory contract with another vendor may be suspended and/or debarred by DGS/DPS. The purchase by agency personnel of goods or services that are on DGS/DPS mandatory contracts from non-contract sources may result in reduction or withdrawal of that agency’s delegated purchasing authority by DGS/DPS (see 13.7). An exemption from a mandatory state contract may be granted by the DGS/DPS contract officer responsible for the contract. The Procurement Exemption Request form should be used to request an exemption. Approved exemption request must be attached to the purchase transaction file either electronically or by hard copy.<sup>2</sup>

Employees responsible for purchasing goods for the Agency must comply with the Agency’s Integrated Supply Services Program (ISSP) Policies and Procedures Manual. The Integrated Supply Services Program is a comprehensive logistics

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<sup>2</sup> Agency Exhibit 5.

management program that supports the current and future supply needs of VDOT. The ISSP incorporates an automated Management Services Program which allows the Department to receive invoices from and process payments to the ISSP Contractor electronically. The Agency selected Company M as the ISSP Contractor to handle its procurement needs. Section 1.4 of the Integrated Supply Services Program Policies and Procedures Manual provides, in part:

The ISSP Contractor will procure all vehicle and equipment maintenance and repair parts; selected equipment maintenance and repair supplies and tools; some road maintenance materials and supplies; selected road maintenance tools; and limited light maintenance equipment. The ISSP Contract is a mandatory use contracts; all items listed on the Master Commodities List (MCL) must be purchased from the ISSP Contractor.<sup>3</sup>

In September 2009, several Superintendents reporting to Grievant wanted to purchase a lubricant, OG, for maintenance equipment used by the Agency. Grievant informed them that it would be okay to do so. On September 9, 2009, Mr. C, used an Agency credit card to purchase \$3,670 of OG from Company DF. Mr. C submitted a credit card statement transmittal along with a copy of his credit card statement to Grievant for approval. On November 5, 2009, Grievant approved the transaction. He signed his name below the statement:

By signing below, I acknowledge that I have reviewed the attached [credit card] Statement and all supporting documentation and that all purchases appeared to be legitimate State business related.

Several other Superintendents made similar purchases of OG from Company DF.

A product similar to OG was available from the ISSP Contractor Company M and was listed on the Master Commodities List. Neither these Superintendents nor Grievant considered purchasing the lubricant from Company M.

On October 23, 2007, Grievant attended Training entitled Procurement End-User Training. During that two hour class, the Instructor discussed Company M. She told the class that Company M was the mandatory contract for inventory and equipment repair parts. She told the class that Company M was responsible for equipment repair parts, even when the item was not listed on the core items list.

On October 23, 2008, Grievant attended training entitled Procurement Annual End-User Training 2008. The Instructor told the class that they should check mandatory sources before they make a direct purchase. She told the class that Company M was the mandatory source for VDOT core inventory items.

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<sup>3</sup> Agency Exhibit 6.

The Agency made its Master Commodities List available to employees on its website. The Agency also provided training to employees regarding what items were on the Masters Commodities List. Grievant was invited to attend that training in April 2007.

### **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.”<sup>4</sup> 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.”

“[U]nsatisfactory work performance” is a Group I offense.<sup>5</sup> In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Beginning in September 2009, several Superintendents reporting to Grievant purchased a chemical lubricant from Company DF. Under the Agency’s policies, Company M was the ISSP Contractor and a similar lubricant should have been purchased from Company M. The Superintendents failed to comply with Agency purchasing policy. Grievant was responsible for reviewing the purchases of the Superintendents and determining whether those purchases should be approved for payment. Grievant incorrectly approved the purchases from Company DF. Grievant’s work performance was unsatisfactory thereby justifying the issuance of a Group I Written Notice.

Grievant argued that he did not know that Company M was a mandatory source for the purchase of chemical lubricant. He argued that he was not properly informed by the Agency that Company M was a mandatory source. He presented the testimony of employees who also attended the Agency training provided to him. Several of these witnesses testified that they did not know that Company M was a mandatory source. Grievant argued because these other employees did not know Company M was a mandatory source, he could not be expected to know that Company M was a mandatory source.

Grievant’s arguments fail. Grievant was obligated to comply with the Agency’s procurement policies. Part of his obligation was to attend training and learn the material provided in training. Grievant attended at least two training sessions in which Company

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<sup>4</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>5</sup> See Attachment A, DHRM Policy 1.60.

M was discussed as a mandatory source. Grievant argued that Company M was not discussed during those training sessions. The Instructor testified that she discussed that Company M was a mandatory source during those training sessions. Her testimony was credible. The fact that other employees who attended the training were either inattentive or failed to remember the Instructor's discussion regarding Company M does not excuse Grievant's failure to recognize Company M as a mandatory source. When compared to his subordinates, Grievant had a heightened responsibility. He was obligated to verify that his subordinates had not made a purchasing mistake. Showing that the Superintendents made mistakes does not justify Grievant's mistake. To the contrary, it shows the importance of Grievant knowing the policies to prevent his subordinates from making mistakes.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..."<sup>6</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action 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.

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<sup>6</sup> Va. Code § 2.2-3005.

2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must 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.<sup>7</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.