

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 01/31/11; Decision Issued: 02/16/11; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9484; Outcome: No Relief – Agency Upheld; **Administrative Review**: AHO Reconsideration Request received 03/03/11; **Reconsideration Decision** issued 07/05/11; **Outcome**: Original decision affirmed; **Administrative Review**: EDR Ruling Request received 03/03/11; EDR Ruling No. 2011-2919, 2011-2920 issued 07/21/11; **Outcome**: AHO's decision affirmed.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9484**

Hearing Date: January 31, 2011  
Decision Issued: February 16, 2011

**PROCEDURAL HISTORY**

On July 6, 2010, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory job performance

On August 3, 2010, 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 December 8, 2010, the EDR Director issued Ruling No. 2011-2846, 2011-2847 consolidating this grievance with Case No. 9485. On January 4, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 31, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Representatives  
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 Operations Manager II at one of its Facilities. He has been employed by the Agency for over 20 years. The purpose of this position is:

Manage and oversee all maintenance, maintenance replacement, and construction activities for an assigned geographical area of the Residency. Duties include efficient planning and monitoring of Area's budget to ensure cost-effectiveness. Ensure assigned area complies with safety program. Ensure all in environmental policies and guidelines are in compliance. Resolves complaints from citizens, coworkers and public officials. Manage and direct employee relations programs to include performance evaluations, training, EEO, and employee selection process.<sup>1</sup>

One of Grievant's Measures for Core Responsibilities was:

On a (District/Residency/Area) -- wide basis, plans, develops, and monitors the IMS inventory program, to include adhering to purchasing requirements and meeting established IMS goals. Ensures appropriate

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<sup>1</sup> Agency Exhibit 6.

segregation of duties, compliance to policies and procedures, and meets established deadlines. Establishes, monitors, and adjusts stock levels based on need. Review reports for accuracy and authorizes by signature. Responds to local audit findings and ensures proper resolution to irregularities. Ensures designated backup personnel maintain adequate proficiency levels in performing IMS functions. Adheres to purchasing requirements by established Policies and Procedures.<sup>2</sup>

No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

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 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>3</sup>

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<sup>2</sup> Agency Exhibit 6.

<sup>3</sup> Agency Exhibit 5.

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 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 contract; all items listed on the Master Commodities List (MCL) must be purchased from the ISSP Contractor.

The Agency made its Master Commodities List available to employees on its website. On May 10, 2007, the Agency presented training at Residency S regarding the Master Commodities List. The training was intended for any employee who normally requested and received parts from Company C. Grievant was invited to attend the training.

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.

On September 16, 2009, Grievant purchased chain lube from Company DF. He discussed the need to purchase the product with his Supervisor and was advised by the Supervisor to purchase the product from Company DF.

On October 14, 2009, Grievant purchased restroom air freshener for use at the Facility where Grievant worked. He did not purchase the item from Company M.

On October 14, 2009, Grievant purchased an asphalt and tar remover for use on his crew's equipment. He did not purchase the item from Company M.

## **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.

Grievant purchased chain lube from Company DF rather than Company M. There is no basis for the Agency to take disciplinary action against Grievant with respect to his purchase of chain lube because prior to the purchase, Grievant discussed the need for the purchase with his Supervisor and the Supervisor directed Grievant to make the purchase. Grievant was obligated to comply with the Supervisor's instructions. The error made by the Supervisor was not so obvious or significant that Grievant should have known to disregard the instruction.

Grievant was expected to purchase items for the Agency by first determining whether the items were available on the Master Commodities List maintained by Company M. Only if the items were not available on the Master Commodities Lists, could Grievant purchase the items from another company using his Agency issued credit card. The Agency presented credible testimony that the type of items the Grievant purchased were available on the Master Commodities List. The Agency argued that Grievant should have selected the items on the Master Commodities List rather than purchasing items from a vendor other than Company M. On October 14, 2009, Grievant purchased restroom air freshener and asphalt and tar remover from a company other than Company M. Grievant's purchases were inconsistent with the Agency's expectations for his work performance thereby justifying the issuance of a Group I Written Notice.

Grievant testified that he looked on the Master Commodities List for the products could not find them. There is no dispute that the brands of the items that Grievant purchased were not on the Master Commodities List. Grievant's obligation however, was not to determine whether a product of a particular brand was on the Master

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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.

Commodities List. His obligation was to determine whether a product of the type he desired was on the Master Commodities List.<sup>6</sup>

Grievant argued that asphalt and tar remover was only available from Company M in 55 gallon drums. He wished to purchase the product in 1 gallon containers so that they can be more easily distributed to his employees. The Agency argued that it would not have been difficult for Grievant to purchase a 55 gallon drum and then put the product into smaller containers if necessary. Although Grievant's justification for his selection is logical, it does not change the fact that asphalt and tar remover was available on the Master's Commodities List from Company M. Grievant was obligated to purchase from Company M given that it had asphalt and tar remover for sale. The fact that the item came in a certain size container did not change the fact that the type of item was available from Company M.

On the other hand, Grievant repeatedly states in his grievance documents that he did not know that Company M was a mandatory source.<sup>7</sup> He argued that because he had not been informed that Company M was a mandatory source, it serves as an excuse for his failure to purchase the items from Company M. The question is what to make of these comments. Grievant's statement that he did not know that Company M was a mandatory source is consistent with the Agency's assertion that if Grievant in fact viewed the Master Commodities List in October 2009, he failed to search diligently and identify the items he needed to purchase. The fact that Grievant did not know in October 2009 that Company M was a mandatory source is not an excuse for his failure to purchase items available on the Master Commodities List.

Grievant argued that the Agency has not established that in September and October 2009, there were items on the Master Commodities List similar to the items that Grievant purchased. The Agency points out that it reviewed the Master Commodities List in January 2010 and found similar items to those purchased by Grievant. The Agency, however, concedes that it does not have a printout or static list of those items available on the days that Grievant made his purchases. The Master Commodities List is a fluid list with items being added and subtracted on a daily or weekly basis. There exists sufficient evidence for the Hearing Officer to conclude that on October 14, 2009 the Master Commodities List contained a restroom air freshener and asphalt and tar remover as items to purchase. The Agency employee responsible for maintaining the Master Commodities List testified that those items were available on the Master Commodities List in October 2009. Grievant has admitted that an asphalt and tar remover was on the Master Commodities List although it was not available in 1 gallon containers.

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<sup>6</sup> For example, if an employee wished to purchase a particular brand of tire for a vehicle but another brand was on the Master Commodities List, the employee would be obligated to purchase the brand of tire on the Master Commodities List even if he or she preferred a different brand.

<sup>7</sup> The Agency has presented sufficient evidence to show that Grievant should have known that Company M was a mandatory source. It provided training to Grievant in which the topic of Company M as a mandatory source was discussed.

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>8</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.

Grievant argued that he was denied procedural due process by the Agency because the Agency did not place him on notice of its intent to take disciplinary action and afford him the opportunity to present his available defenses. If the Hearing Officer assumes for the sake of argument that Grievant's assertion is true, the outcome of this case does not change. As part of the grievance hearing, Grievant was afforded the opportunity to present any evidence or arguments that he could have presented to the Agency during the Step Process. Any defect in the procedural due process afforded by the Agency has been cured through the grievance hearing process.

## 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.
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

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<sup>8</sup> Va. Code § 2.2-3005.



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>9</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>9</sup> 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: 9484-R**

Reconsideration Decision Issued: July 5, 2011

**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.

Grievant offers as new evidence a “Quick Reference Pocket Guide” that was issued to him in the training he had in 2007 with Mr. B. He argues that the document is new evidence because it was unavailable at the time of the hearing because Mr. B stated that he no longer had records of his training manual from 2007. The document shows that in order to get an item added to the Master Commodities List, an employee was to purchase the item using the Agency credit card, show it to Company M, complete the item addition form, and ask the Company M Contract Administrator to seek approval.

Grievant points out that the pamphlet defeats one of the Agency's main arguments that Grievant could have sought inclusion into the Master Commodities List of the items he purchased if he needed those items prior to purchasing them. If the Hearing Officer assumes for the sake of argument that the pamphlet constitutes new evidence, the outcome of this case does not change. The Agency disciplined Grievant for failing to review the Master Commodities List before purchasing items from a source other than Company M. The Agency did not discipline Grievant for failing to add items to the Master Commodities List. The Hearing Officer did not rely upon the Agency's argument that Grievant could have attempted to have the items added to the Master Commodities List and then purchase them once they were added to the List. In addition, no evidence was presented that Grievant purchased items from a company other than Company M in order to present the items to the Company M Contract Administrator for inclusion on the Master Commodities List.

Grievant also presented evidence of past purchase orders for products obtained from Company DF. Grievant argues that the purchase orders show that the Agency had been doing business with Company DF for years without any objection from the Procurement office. To the extent these purchases show that some employees engaged in behavior similar to Grievant's behavior, the outcome of this case does not change. Only if Grievant can show that Agency managers knew or should have known that items on the Master Commodities List were being purchased from a source other than Company M, can Grievant establish the inconsistent application of disciplinary action. As Grievant points out, the Agency's witness, Ms. H, was asked whether she was aware of the State doing business with Company DF prior to the 2009 audit. Ms. H replied "no".

The request for reconsideration does not provide a basis to reverse the original hearing decision. 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.

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer