

Issue: Group III Written Notice with Termination (Theft or Unauthorized Removal of State Property); Hearing Date: 04/06/11; Decision Issued: 04/07/11; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9527; Outcome: No Relief – Agency Upheld.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9527**

Hearing Date: April 6, 2011  
Decision Issued: April 7, 2011

**PROCEDURAL HISTORY**

On December 8, 2010, Grievant was issued a Group III Written Notice of disciplinary action with removal for actions unbecoming a State employee/aiding and abetting the theft or unauthorized removal of State property.

On December 13, 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 February 22, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the timeframe for issuing a decision in this appeal due to the unavailability of a party. On April 6, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
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 Department of Corrections employed Grievant as a Power Plant Superintendent at one of its Facilities. The purpose of his position was to, "maintain safe and efficient operation of boiler plant operations for [the Facility]. This includes both inside and outside operations." He had been employed by the Agency for approximately 20 years without receiving any disciplinary action. He received an overall rating of Exceeds Contributor for his performance evaluation issued October 1, 2010.

Grievant supervised the Lead Worker at the Facility. It became necessary to replace the copper cable used on a 200 horse power motor located in the Boiler Plant of the Facility. A Lead Worker and an inmate replaced the cable. The Lead Worker asked Grievant if he could have the copper cable. Grievant wrote a statement as part of the Agency's investigation describing the interaction as follows:

I vaguely remember the incident where [Lead Worker] asked me if he could have the copper. I don't specifically recall the event, but the bottom line is that I gave him permission to take the copper cable. I realize that I should not have done that, but it was one of those "brain dead" moments.

On November 1, 2010, the Lead Worker sold 99 pounds of copper to a recycling company for \$232.95.

The Agency attempted to have the Lead Worker prosecuted for theft. The local Commonwealth's Attorney declined to prosecute because the Lead Worker has been authorized by his supervisor to remove the copper. The Agency issued the Lead Worker a Group III Written Notice with removal.

### CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."<sup>1</sup> Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."<sup>2</sup> Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."<sup>3</sup>

Virginia Department of Corrections Operating Procedure 135.1(IV)(C), *Standards of Conduct*, states, "[t]he list of offenses in this procedure is illustrative, not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the provisions of this procedure based on the severity of the offense."

The Agency contends that Grievant engaged in an act that undermined the effectiveness of the Agency. The Agency's judgment is supported by the evidence. The Agency's Warden testified that it was well known at the Facility that employees were not to remove any property of the Agency regardless of value. Although Grievant did not have the authority to authorize the Lead Worker to remove the copper, he was in a position to control the behavior of the Lead Worker by denying the Lead Worker's request. Based on the evidence presented, it appears that the Lead Worker made his decision to remove the copper based upon Grievant's apparent authority as a supervisor to sanction the Lead Worker's request. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice of disciplinary action. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

Grievant argues that the disciplinary action is too harsh and that a more appropriate level of discipline would not have included removal. To the extent the

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<sup>1</sup> Virginia Department of Corrections Operating Procedure 135.1(X)(A).

<sup>2</sup> Virginia Department of Corrections Operating Procedure 135.1(XI)(A).

<sup>3</sup> Virginia Department of Corrections Operating Procedure 135.1(XII)(A).

Hearing Officer agrees with Grievant's assertion, the Hearing Officer is not a super personnel officer who can substitute his preference for that of the Agency's decision. Once the Agency has established misconduct by an employee and that the misconduct rose to a Group III level of disciplinary action, the Hearing Officer is obligated under the Rules for Conducting Grievance Hearings to give deference to the Agency's decision.

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>4</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.

Grievant contends the disciplinary action should be mitigated because of his length of service, absence of any prior disciplinary action, and honesty throughout the proceeding. Although these facts speak well of Grievant, when considered separately and together, they do not constitute facts sufficient to mitigate the disciplinary action taken by the Agency. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

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<sup>4</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>5</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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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