

Issue: Group III with Termination (theft – removal of state property); Hearing Date: 06/10/11; Decision Issued: 06/13/11; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9574; Outcome: Full Relief; Fee Addendum issued 07/10/11 awarding \$2,633.11 in attorney's fees.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION

In the matter of: Case No. 9574

Hearing Date: June 10, 2011
Decision Issued: June 13, 2011

PROCEDURAL HISTORY

Grievant is a buildings and grounds supervisor for the Department of Corrections (“the Agency”), with many years of service. On January 18, 2011, the Grievant was charged with a Group III Written Notice for theft or removal of state property. The Written Notice included termination of employment. The Grievant had no other active Written Notices.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On April 18, 2011, the Department of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. A pre-hearing conference was held by telephone on April 20, 2011. The hearing was originally scheduled for May 11, 2011, but both the Grievant and the Agency retained counsel in place of their initial advocates, and the parties jointly moved for continuance for additional time so that investigation and discovery could be completed. Accordingly, for good cause shown, the timeline was extended and the grievance hearing scheduled for May 11, 2011, was continued to Friday, June 10, 2011, at which time the grievance hearing was conducted at the Agency’s facility.

On motion of the Grievant, the hearing officer, on April 27, 2011, ordered the Agency to provide to the Grievant, by May 4, 2011, “the investigative report, incident reports, receipts, any recordings and all other materials used in the decision to terminate the grievant from employment.”¹

¹ The Agency did not produce two fraud and abuse hotline reports, dated October 12, 2010, and October 13, 2010, implicating the Grievant. The two reports came to light during the grievance hearing. (The reports were accepted into the grievance record as Grievant’s exhibits.) (The Grievant complained that, despite repeated requests, he never received any documents until ordered by the hearing officer.) The Written Notice specifically referred to the anonymous hotline tip. The Grievant moved for an adverse inference or some other appropriate sanction for the Agency’s failure to produce these documents. The motion was taken under advisement. Because of the grievance outcome favorable to the Grievant, the motion is considered moot.

Both the Agency and Grievant submitted documents for exhibits that were, without objection from either side, accepted into the grievance record, and they will be referred to as Agency's or Grievant's Exhibits, accordingly. The hearing officer has carefully considered all evidence presented.²

APPEARANCES

Grievant
Counsel for Grievant
Representative and Witnesses for Agency
Counsel for Agency

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?

The Grievant requests rescission or reduction of the Group III Written Notice, reinstatement, back pay, and attorney's fees.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth.

² The Agency requested that the fraud and abuse hotline documents be subject to a protective order, prohibiting the Grievant's disclosure or dissemination for any purpose other than this grievance process. With the Grievant's agreement, it is so ordered.

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 to 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 § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent 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 employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency's Standards of Conduct, Operating Procedure 135.1, defines Group III offenses to include acts and behavior of such a serious nature that a first occurrence normally should warrant removal. Agency Exh. 5. An example of a Group III offense is theft or unauthorized removal of state property.

The Offense

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

The Agency employed Grievant as a buildings and grounds supervisor with many years of service in varying capacities. The Grievant has no other active disciplinary actions, and he has a good record of performance reviews.

In August 2010, a roofing contractor reported that copper cable for a lightning protection system that has been stored in and behind an Agency facility storage shed was missing. The cable had been removed for renovations and stored until reinstalled. The reported quantity of missing copper cable was 1,975 feet.

At hearing, the internal investigator testified consistently with the charge in the Written Notice and his final investigation report, noting information he obtained through witness interviews. Agency Exh. 2. In August 2010, the missing cable came to light, and the internal investigator initiated an investigation, interviewing multiple witnesses. During the course of the investigation, in October 2010, the state fraud and abuse hotline received an anonymous tip that the Grievant had stolen the copper cable and sold it to a local scrap metal dealer. Some specific details of the transaction were provided in the anonymous tip, including a volume of transactions between \$10,000 to \$12,000.

The internal investigator located a local scrap metal dealer, Mr. P, and interviewed him. At first, Mr. P denied knowing or dealing with the Grievant. One of Mr. P's employees identified the Grievant's photograph, out of 36 Agency photographs of employees shown to him, as a person who had sold copper to Mr. P. Upon further questioning, Mr. P, admitted to having bought copper cable from the Grievant with transaction details consistent with the anonymous tip. Mr. P produced a nameless receipt, dated June 30, 2010, that he attributed to the Grievant's transaction. The receipt was for 1,554 pounds of #1 copper for \$2.50/lb. (\$3,885.00) and 515 pounds of insulated copper at \$2.30/lb. (\$1,184.50). Agency Exh. 3, B-3. The internal investigator also obtained copies of receipts for Mr. P's purchase of copper and other material from the Grievant's stepson, totaling 1,392 pounds at rates from \$1.90/lb. to \$2.50/lb. Agency Exh. 3; B-4, B-5, B-6.

The internal investigator testified that he determined in his investigation that the Agency's missing copper cable weighed 5.9 oz./foot. Based on this weight, the missing cable weighed a total of about 728 pounds. The internal investigator testified that anyone would need machinery to remove that amount of cable at once. The internal investigator's theory is that the Grievant removed the cable from the Agency premises gradually over time, cutting in perhaps six foot lengths at a time. ($1,975 \text{ ft.} \div 6 = 329.17$ separate sections and removals.)

The warden testified that, based on the information developed by the internal investigation, including the information from the anonymous tip, he found a preponderance of the evidence established that the Grievant was guilty of converting the Agency's copper cable, justifying issuance of the Group III Written Notice with termination on January 18, 2011.

The Grievant testified that he did not steal the Agency's copper cable. He testified that he had a side contractor's business and that he, from time to time, would demolish structures and allow his stepson to sell the recovered scrap metal, including copper, as part payment to him and his helpers for the demolition work. The Grievant testified that he had accumulated scrap copper from his contracting business and he also gave his scrap supply to his stepson to sell to raise money. The Grievant actually assisted his stepson by hauling the material with his truck and on his trailer to the scrap metal dealer, Mr. P. The Grievant testified that he never sold any copper or anything to Mr. P, but he did visit Mr. P's business for the possible purchase of a fuel tank. The Grievant's presence with his stepson could explain why Mr. P's employee identified the Grievant as one who had sold copper.

The internal investigator testified that almost anyone had access to the storage shed, and that the facility surveillance camera that could capture the storage shed was inoperable. The Grievant testified that he worked the day shift and parked his motor vehicle at work in an open parking area that was visible by many employees and inmates, including the observation tower. Further, the Grievant testified that any Agency cutting tools that could cut copper cable had to be checked out at the facility for security reasons.

Based on the investigation of the internal investigator, the Commonwealth's Attorney issued an arrest warrant for the Grievant. At the preliminary court hearing, Mr. P recanted his story as recorded by the internal investigator. In court, Mr. P denied under oath any transactions

with the Grievant, and the criminal charge against the Grievant was dismissed on April 8, 2011. Grievant's Exh.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

It is reasonable for the Agency to discipline an employee based on the conclusions of an internal investigation, and the warden here acted accordingly and issued reasonable discipline in the face of the findings his agency presented to him. However, the grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. I find the Grievant's testimony to be at least as credible as the contrary information and conclusions charged by the internal investigation.

Based on the manner, tone, and demeanor of the witnesses, I find that the Grievant credible. The hearing officer cannot, on the face of interview summaries from non-testifying persons, weigh the credibility of these witnesses' unsworn accounts; they cannot be cross-examined, nor their recollections probed. While the Agency may point to certain corroborating information to support its conclusions, there are just as many inconsistencies. None of the witnesses interviewed by the internal investigator saw the Grievant in possession of any of the missing copper cable, and the Grievant had no particularly special access to the material. The Agency has the burden to show convincing information beyond equipoise. Here, we would have to resort to conjecture or speculation to conclude that the Grievant committed the alleged wrongful act. When there are conflicting, credible accounts regarding a situation or issue, the charging party needs to show a reliable basis on which to conclude one way or the other.

The Grievant himself was the only witness testifying at the grievance hearing with first-hand knowledge, under oath, and subject to cross-examination or a determination of credibility. The internal investigator's testimony presented his summaries of information he gathered from third parties. While the hearsay facts included in the investigation report and the internal investigator's testimony are admissible under the grievance procedure, such statements are not subject to cross-examination. The most important person in the Agency's case is Mr. P; he first denied to the investigator dealing with the Grievant; then he changed his story to implicate the Grievant and cause a criminal charge against the Grievant; then at trial Mr. P recanted and denied any transactions with the Grievant. At least one of Mr. P's stories is a lie, but the one given in court, under oath, is exculpatory for the Grievant. Picking the truth from Mr. P's inconsistent accounts is impossible without the opportunity for cross-examination and observation of credibility. By its very nature, an anonymous tip cannot be confronted. Thus, I find the weight of the anonymous tip, the investigation report, and the hearsay statements contained therein are not sufficient to bear the burden of proving misconduct or that the discipline was warranted and appropriate.

The evidence presented at the grievance hearing did not show by a preponderance of the evidence that the Grievant committed any theft or removal of state property from the Agency. The thread of consistency this hearing officer finds in the evidence presented is that the Grievant assisted his stepson in the sale to Mr. P of scrap metal and copper not shown to be stolen from the Agency. Accordingly, the Agency has not proved the misconduct for the Written Notice and the discipline must be rescinded.

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 **reversed**. Thus, the Agency is ordered to reinstate Grievant to his former position, or if occupied, to an objectively similar position. The Grievant is awarded full **back pay** from which any interim earnings must be deducted (which includes unemployment compensation and other income earned or received to replace the loss of state employment). The Grievant is restored to full benefits and seniority. Grievant is further entitled to seek a reasonable **attorney's fee**, which cost shall be borne by the agency.

APPEAL RIGHTS

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 is 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 the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.
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 the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

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 days; the 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.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



Cecil H. Creasey, Jr.
Hearing Officer

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

**ATTORNEY'S FEES ADDENDUM TO
DECISION OF HEARING OFFICER**

In the matter of: Case No. 9574

Hearing Date: June 10, 2011
Decision Issued: June 13, 2011
Attorney's Fees Addendum Issued: July 10, 2011

ATTORNEY'S FEES ADDENDUM

Applicable law provides that an employee who is represented by an attorney and who substantially prevails on the merits of a grievance challenging his discharge is entitled to recover reasonable attorney's fees, unless special circumstances would make an award unjust. Rules for Conducting Grievance Hearings, effective August 30, 2004 (the "Rules"), Section VI(D); Va. Code § 2.2-3005.1.A. Accordingly, a hearing officer may order relief including reasonable attorney's fees in grievances challenging discharge if the hearing officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust. § 7.2(e) Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual, effective August 30, 2004; the Rules, Section VI(D). For an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee. *Id.*

The decision reinstated the grievant. Accordingly, the hearing officer finds that grievant substantially prevailed in this case. The hearing officer also finds that there are no special circumstances which would make an award of attorney's fees unjust. Grievant's counsel submitted an attorney's fee petition dated June 23, 2011. No agency response to the fee petition was filed with the hearing officer. However, the hearing officer has the obligation to review the attorney's fee petition and award such fees as allowable.

The grievant's counsel's petition includes a total of 20.10 hours, from April 28, 2011, through June 22, 2011. I find the attorney's fees to be reasonable and warranted. Upon review of the attorney hours indicated, and the issues involved in the matter, I approve the request of 20.10 hours of attorney time billed at \$131/hour, for a total of \$2,633.10.

AWARD

Grievant's counsel is awarded attorney's fees incurred from April 28, 2011, through June 22, 2011, in the amount of \$2,633.10 (20.10 hours x \$131.00 per hour).

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within ten (10) calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in § VII(B) of the Rules and may be appealed to the Circuit Court in accordance with § VII(C) of the Rules and § 7.3(a) of the Grievance Procedure Manual. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

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.

I hereby certify that a copy of this decision was sent to the parties' representatives by e-mail.



Cecil H. Creasey, Jr.
Hearing Officer