Issue: Group III Written Notice with Termination (unauthorized removal of State property); Hearing Date: 10/02/12; Decision Issued: 10/22/12; Agency: DMA; AHO: Carl Wilson Schmidt, Esq.; Case No. 9915; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 11/02/12; EDR Ruling No. 2013-8469 issued 01/08/13; Outcome: AHO's decision affirmed; Judicial Appeal: Appealed to Circuit Court in Nottoway County 01/22/13; Circuit Court ruling issued 06/12/13; Outcome: Remanded to AHO for rehearing; Rehearing arguments heard 07/19/13; Supplemental Decision issued 07/31/13; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request on supplemental decision received 08/08/13; EDR Ruling No. 2014-3680 issued 08/22/13; Outcome: AHO's decision affirmed; Judicial Appeal: Appealed to Circuit Court in Nottoway County 08/28/13; Outcome: Pending.**

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number:

Hearing Date: October 2, 2012
Decision Issued: October 22, 2012

PROCEDURAL HISTORY

On June 6, 2012, Grievant was issued a Group III Written Notice of disciplinary action with removal for selling government property for personal gain without authorization.

On June 25, 2012, 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 September 5, 2012, the Office 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 case due to the unavailability of a party. On October 2, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency's Counsel
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 Military Affairs employed Grievant as a plumber at one of its facilities. He had been employed for approximately 14 years prior to his removal effective June 7, 2012. No evidence of prior active disciplinary action was introduced during the hearing. Grievant's performance evaluations showed that his work performance was satisfactory to the Agency.

The Agency intended to demolish several old buildings at one of its Facilities. Two of the buildings owned by the Agency were leased to the Navy. As a tenant, the Navy had the right to occupy the buildings but did not own the buildings or fixtures in the buildings. These buildings contained radiators made of copper and brass. Grievant recognized that the radiators could be recycled and reduced to valuable copper and brass that he could sell for a profit. Grievant had observed other employees receive permission to remove items from buildings set for demolition. Those employees had received permission from the demolition contractors who had been contracted to demolish buildings. Under the Agency's contract with the demolition companies, the demolition companies took control of the buildings once they started demolition. A demolition contractor was authorized to dispose of the contents of a building by whatever means the contractor chose including giving away the contents.

Chief B was employed by the Navy and was not a demolition contractor. Grievant knew that Chief B was employed by the Navy and not in Grievant's chain of

command. Based on Grievant's observation of Chief B, Grievant believed that Chief B was in control of the two buildings. Grievant did not know of the details of the Navy's lease of the buildings and he considered the two buildings to be owned by the Navy and under the control of Chief B.

Grievant and Chief B began talking about the pending demolition of the two buildings. Grievant asked Chief B if the Navy was done with the radiators. Chief B replied "yes we are done". Grievant asked "so I can have the radiators?" The Chief B replied "I do not need them – you can have them." Chief B believed he was telling Grievant that Grievant could have the radiators in Grievant's capacity as an employee of the Agency. Grievant interpreted Chief B's answer to mean that Chief B had authorized Grievant to remove the radiators for Grievant's personal use. Grievant believed that Chief B had the authority to authorize Grievant to remove the radiators because Chief B was in control of all of the activities and the building and "was the boss down there." On two weekends and with his personal pickup truck and trailer, Grievant went to the buildings and removed the radiators. He did so in plain view of Agency employees including security staff at the Facility's gates and without attempting to hide his behavior.

Grievant sold the radiators to a local recycler for $1,939.70. He signed the recycler's purchase ticket which stated, "I hereby certify that I have the right to possess and sell this scrap."

When the Agency discovered that the radiators were missing, an investigator questioned Grievant. Grievant admitted to taking the radiators and said that he had been given permission to do so by Chief B. Grievant later paid the Agency $1,939.70.

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."[1] 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."

"[T]heft or unauthorized removal of state records/property" is a Group III offense.[2] The Agency has not established that Grievant had the intent to steal the radiators. Grievant believed he had the authority to remove the radiators because he had been given permission to remove them by the man in charge of the building containing the

[1] The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

[2] See, Attachment A, DHRM Policy 1.60.

radiators. Based on Grievant's credible testimony, it is clear he did not intend to steal the radiators and he genuinely believed he had the authority to take the radiators from the buildings.

It is not necessary for the Agency to establish the Grievant intended to steal the radiators. The Agency has established that Grievant's removal of the radiators was unauthorized. No employee of the Agency authorized Grievant to remove the radiators. Grievant knew that Chief B was not an employee of the Agency. Grievant assumed that Chief B had the authority to speak on behalf of the Agency. Grievant's assumption was unreasonable. The Agency took no actions to grant Chief B actual or apparent authority to authorize removal of the radiators. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for unauthorized removal of State property. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant's removal must be upheld.

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…."[3] 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 the Agency inconsistently disciplined its employees. Grievant presented evidence of other employees who engaged in inappropriate behavior but were not removed from employment. Grievant, however, did not present evidence of any employees who had engaged in theft or unauthorized removal and remained employed by the Agency. Another employee, Mr. P, also took radiators and he was removed from employment. In light of the standard set forth in the Rules, 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**.

[3] Va. Code § 2.2-3005.

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 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 14th St., 12th Floor
   Richmond, VA 23219

   or, send by fax to (804) 371-7401, or e-mail.

3. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

   Office of Employment Dispute Resolution
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

   or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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.[4]

[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

[4] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 9915-S

Argument Date: July 26, 2013
Decision Issued: July 31, 2013

PROCEDURAL HISTORY

During the original hearing, Grievant submitted certain documents that were admitted as exhibits and considered by the Hearing Officer to issue the Original Hearing Decision dated October 22, 2012. After the Original Hearing Decision was issued, the case record was transferred to others for review and for delivery to the Circuit Court. Once the case record was before the Circuit Court, the parties discovered that some of the Grievant's Exhibits were missing from the record. On June 12, 2013, the Circuit Court remanded the grievance to the Hearing Officer "for the purposes of giving the Appellant the opportunity to supplement the record with exhibits containing those personnel records and to argue what effect, if any, that supplementation should have on the hearing officer's decision in this matter."

On July 22, 2013, the Hearing Officer received proposed exhibits from Grievant's Counsel along with a memorandum in support of the admission of those exhibits. Having previously reviewed the proposed exhibits, the Agency's Counsel sent an email on July 15, 2013 objecting to the introduction of proposed exhibits 1 through 15, 18, 20, and 21.

On July 26, 2013, Grievant's Counsel and the Agency's Counsel appeared by telephone before the Hearing Officer on the record. Grievant's Counsel moved for the admission of 25 exhibits. The Agency's Counsel objected to proposed exhibits 1 through 15, 18, 20, and 21. The Hearing Officer ruled that all 25 exhibits would be admitted into the record. To the extent an exhibit was not relevant, the Hearing Officer indicated he would give such an exhibit little or no weight. The Hearing Officer has reviewed all of the exhibits.

SUPPLEMENTAL DECISION

Grievant's Counsel argued that the Original Hearing Decision was incorrect to the extent it mentioned that Grievant sought the radiators for their valuable brass and copper. Grievant's Counsel asserted that the radiators were made of steel, not brass or copper. The Hearing Officer will adopt this assertion as a finding of fact.

The outcome of this case does not depend on the materials making up the radiators, the value of those materials, or Grievant's motive for recycling the radiators. The radiators were property of the Agency. The Agency had the right to determine what to do with the radiators. That right did not change regardless of whether the radiators had any value at all. The Agency established that Grievant removed the Agency's property without authorization thereby justifying the issuance of a Group III Written Notice with removal. It was not necessary for the Agency to establish that Grievant intended to steal the radiators to uphold the disciplinary action.

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 Human Resource Management …."[5] 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 the Agency inconsistently applied disciplinary action. A basis to mitigate does not exist simply because an Agency has treated two employees differently. Agencies are expected under the Standards of Conduct to consider separately the facts and circumstances of each employee subject to disciplinary action as well as consistently apply discipline among employees. Two employees engaging in similar misbehavior may be treated differently by an Agency if, for example, one employee had a history of prior disciplinary action and another employee had never received disciplinary action. Two misbehaving employees may not be treated differently if, for example, a manager considered one employee to be a close friend but disliked the other employee. In the absence of a legitimate business reasons, an agency cannot single out one employee

[5] Va. Code § 2.2-3005.

for disciplinary action while another employee engaging in the same behavior receives lesser or no discipline.

Mitigation is only appropriate in cases of similarly situated employees. For example, if an employee receives a Group III Written Notice for falsification of a document, he or she cannot establish a basis to mitigate by showing that another employee engaged in a Group III offense of gambling on State property but only received a Group II Written Notice. Falsification and gambling are significantly different behaviors even though both may be considered as Group III offenses. The employees are not similarly situated.

Grievant presented evidence showing that Mr. P arrived to work intoxicated and the Warehouse Manager recommended Mr. P's termination from employment. The Agency did not remove Mr. P from employment based on his intoxication. Grievant and Mr. P are not similarly situated with respect to Mr. P's offense of intoxication.[6] The Agency's failure to remove Mr. P for arriving to work intoxicated is not a basis to mitigate. Grievant also argued that Mr. P used Agency property for his own use and was counseled but not disciplined

It is not unusual for an employee to be counseled by his immediate supervisor and still receive disciplinary action once the matter is addressed by managers higher up in the employee's chain of command. To establish the inconsistent application of disciplinary action with respect to Mr. P's removal of radiators, Grievant must establish that Mr. P's first counseling was in lieu of disciplinary action. Grievant must also establish that Agency managers (not a lower level supervisor) were aware of and agreed to the counseling in lieu of disciplinary action.

Grievant argued that Mr. P stole radiators prior[7] to October 2011 and was counseled in lieu of termination. Only after Mr. P continued to steal radiators in October through December 2011 did the Agency choose to terminate Mr. P's employment, under Grievant's theory. Grievant argued that Grievant and Mr. P were similarly situated. Mr. P was first given counseling and then removed from employment only after Mr. P failed to abide by the counseling, according to the Grievant. Grievant argued that Grievant, in contrast, was immediately removed from employment without having been counseled and given the opportunity to correct his behavior as Mr. P was permitted to do.

Grievant's Supplemental Exhibit 15 shows that the Supervisor counseled Mr. P on September 29, 2011 for: "Use of Leave & Sick Time", "Length of time taking for Lunch time", "Change PT time to be done prior to 1600", "Fridays, work will be in Building 313 unless changed by change of command", and "Use of military/state vehicle

[6] In addition, it appears that Mr. P was a probationary employee in May 2010 when he supposedly arrived to work intoxicated. The Standards of Conduct do not apply to probationary employees. Grievant was subject to the Standards of Conduct.

[7] Page 2 of Grievant's Supplemental Exhibit 23 shows that Mr. P began recycling radiators on September 6, 2011 and continued until December 29, 2011.

for other than government purposes." In the "Improvement and directives" section of the written counseling Mr. P's Supervisor wrote, "Require a written statement that the heating radiators were given to him and were or were not to be taken to the scrap metal area on post."

Mr. P did not provide a written statement to the Supervisor. Grievant's Supplemental Exhibit 22 shows the Supervisor's March 21, 2012 sworn statement in which the Supervisor explained, "I never got that statement and **it slipped my mind** to get it from him." (Emphasis added).

Grievant relies on Grievant's Supplemental Exhibit 23, p. 3, paragraph (a) which provides:

> [Mr. P] told [Trooper M] that he took 30 radiators each from buildings 180b, 1811A, 2304, and 1317 between October and December. In fact, he had already been taking them prior to that and **he had been counseled about it specifically.** On 29 Sep. 11, he was provided instruction to get written permission for the radiators which he acknowledged by signing the counseling statement. However, he never did provide [Mr. B] proof that he had permission but he continued to remove radiators until he was arrested in December. (Emphasis added).

A Civil Engineering Technician was checking buildings scheduled for demolition and found that radiators were missing. On December 29, 2011, the Civil Engineering Technician contacted the Virginia State Police and gave them a report of the missing radiators.[8] Mr. P was arrested on December 30, 2011 for stealing radiators from the Agency.[9] On January 6, 2012, Mr. P was placed on pre-disciplinary leave without pay for alleged criminal conduct by removing government property.[10] On April 3, 2012, Major M recommended Mr. P be removed from employment for misuse of State time and for removing government property (radiators) without permission.[11] On May 9, 2012, Mr. P was convicted of petit larceny.[12] Mr. P was removed from employment by the Agency.

Grievant's Supplemental Exhibit 15 does not show that the Supervisor concluded Mr. P had stolen radiators and then counseled Mr. P regarding taking those radiators. The Supervisor's comment "Require a written statement that the heating radiators were given to him and were or were not to be taken to the scrap metal area on post" shows

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[8] Grievant's Supplemental Exhibit 23.

[9] Grievant's Supplemental Exhibit 25.

[10] Grievant's Supplemental Exhibit 17.

[11] Grievant's Supplemental Exhibit 24.

[12] Grievant's Supplemental Exhibit 25.

the Supervisor suspected Mr. P had stolen radiators but the Supervisor was giving Mr. P an opportunity to establish some legitimate reason for having the radiators.

Grievant's Supplemental Exhibit 22 shows that the Supervisor took no action against Mr. P because it "slipped my mind". Although it seems unusual the Supervisor would forget to obtain Mr. P's statement, no evidence was presented to show that the Supervisor's failure to timely follow up with Mr. P was anything other than oversight.

Grievant's Supplemental Exhibit 23 refers to Mr. P being counseled by the Supervisor on September 29, 2011 but does not indicate that any of the Agency's managers were aware of Mr. P's behavior or that he had been asked by the Supervisor to provide a written statement about the radiators.

When the supplemental exhibits are considered as a whole, it appears that the Supervisor questioned Mr. P's taking of radiators, provided Mr. P with an opportunity to explain, and then failed to follow up to determine the validity of Mr. P's claims about the radiators. No evidence has been presented to show that the Supervisor informed Agency Managers of Mr. P's behavior and then decided Mr. P should be counseled in lieu of disciplinary action. Mr. P was ultimately removed from employment just as was Grievant. The Hearing Officer cannot conclude that the Agency singled out Grievant for disciplinary action such that his removal should be reversed. Grievant's Group III Written Notice with removal is **upheld**.

/s/ Carl Wilson Schmidt

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Carl Wilson Schmidt, Esq.
Hearing Officer

VIRGINIA:

IN THE CIRCUIT COURT FOR NOTTOWAY COUNTY

Grievant/Appellant,

v. **Case No.**

DEPARTMENT OF MILITARY AFFAIRS,

Agency/Appellee,

ORDER

This matter comes before the Court as an appeal of a hearing officer's decision under the statutory grievance procedure for state employees by Appellant formerly an employee of the Department of Military Affairs. Because it appears that the record forwarded to the Court for review pursuant to Virginia Code § 2.2-3006 B by Appellee Department of Military Affairs did not include exhibits containing certain personnel records that were presented to the hearing officer for consideration, the Court REMANDS this case to the hearing officer for the purposes of giving Appellant the opportunity to supplement the record with exhibits containing those personnel records and to argue what effect, if any, that supplementation should have on the hearing officer's decision in this matter. Accordingly it is ORDERED that this case is dismissed from the docket of this Court and remanded for further proceedings before the hearing officer.

The Clerk is directed to send copies of this order to counsel of record.

Judge

6-12-13
Date

NOTTOWAY CIRCUIT CT.
A Copy, Teste: Jane L. Brown, Clerk
By _____ D.C.

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