



**COMMONWEALTH of VIRGINIA**  
*Department of Human Resource Management*

**OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 11643**

Hearing Date: March 29, 2021  
Decision Issued: April 19, 2021

**PROCEDURAL HISTORY**

On November 17, 2020, Grievant was issued a Group II Written Notice of disciplinary action with removal for failure to follow policy and the Code of Virginia.

On December 15, 2020, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On January 11, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 29, 2021, a hearing was held by remote conference.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's 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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Transportation employed Grievant as a District Survey Manager at one of its locations. Grievant had been employed by the Agency for 31 years and eleven months. Grievant had prior active disciplinary action. On March 23, 2020, Grievant received a Group II Written Notice for failure to follow policy.

Grievant reported to the Supervisor. Mr. W reported to Grievant. Mr. R and Mr. T reported to Mr. W. Mr. Z was the project manager.

The Agency could only enter private property with the landowner's permission or by following a statutorily mandated notification process requiring two waiting periods. The Agency had a mandatory owner property tracking sheet. The tracking sheet was to be used to track all permission and intent letters sent to property owners and was to be stored in the survey research folder for each project. Notes of property owners' requests were stored in an electronic spreadsheet.

The Extension Project included eight privately owned properties. Initial work on the Extension Project was performed by Contractor R. The Agency had a valid Right of Entry from December 5, 2016 to March 5, 2017. The Agency needed to enter the properties to locate borings as part of a soil boring survey. A second Right of Entry letter was sent in

April 2020. The work began on June 9, 2020 and half of the sites had been collected. The process was halted due to heat advisories and difficult terrain to access.

The Agency's permission to enter the Extension Project ended June 26, 2020. This information was available to anyone reading the Agency's tracking spreadsheet. This meant that VDOT staff could not enter Extension Project property without the permission of the owners or completion of a notification process requiring two waiting periods.

On July 6, 2020, the Supervisor spoke with staff including Mr. W. They discussed completion of the Extension Project. They discussed having Contractor R complete the work. The Supervisor did not set a due date for completing the work. Grievant was not at work on July 6, 2020.

On July 6, 2020, Mr. W sent Mr. Z an email with a copy to Grievant. The email stated, "Right of entry – It seems it has expired. \*\*\* Yes, it expired June 26, 2020."<sup>1</sup>

Grievant returned to work on July 7, 2020. Grievant received a copy of an email sent by Mr. W indicating that the Right of Entry expired on June 26, 2020. Grievant thought the work had been completed by July 1, 2020. He was shocked that the work remained unfinished. Grievant did not want to use Contractor R to complete the work.

On July 7, 2020, Grievant spoke with Mr. R. about the project. Grievant asked Mr. R if he could get the job done in a timely fashion. Mr. R said he would be able to complete the project by the end of the week or possibly by the beginning of the next week. Mr. R told Grievant the vegetation was less dense in the remaining areas that needed collection and he had access to enter the gate and could drive on the property to reduce the amount of equipment that had to be carried in and out of the property.

On July 8, 2020, Grievant received a proposal from Contractor R "to provide for 3D location of up to twenty-seven (27) as-drilled boring sites." The scope of services included, "[Contractor R] will attempt to contact property owners by phone to extent the Right of Entry that previously expired on June 26, 2020." Grievant replied to Contractor R "to consider negotiations ended and this task closed and that the department will pursue alternative methods to complete the task."

On July 8, 2020, Mr. R and Mr. H entered the properties in the Extension Project. The Agency did not have owner permission to enter several of the properties in the Extension Project. Grievant did not contact the property owners to obtain permission to enter the property. He did not assign anyone else responsibility for obtaining permission from the property owners. Grievant did not follow the notification procedures to obtain a Right of Entry.

On July 10, 2020, Grievant sent an email to the Supervisor and Mr. W stating:

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<sup>1</sup> Agency Exhibit p. 166.

We took care of the [Extension Project] request without your involvement or assistance as far as I know, so next week the group will go back to their existing responsibilities.<sup>2</sup>

On September 30, 2020, the Supervisor received a telephone call from the Assistant District Commissioner reporting that a property owner had complained to the Deputy District Engineer that a survey team had entered private property after the Intent to Enter Date had expired.

## 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>3</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.”

Va. Code § 33.2-1011 authorizes the Agency to enter private property “for the purposes of making examination and survey thereof, including photographing; testing, including soil borings or testing for contamination” with the landowner’s permission or after completion of a notification process and providing the landowner with a Notice of Intent to Enter.

The Agency has a Survey Manual “for the guidance of all personnel engaged in securing and using survey data.”<sup>4</sup> Section 4.01.01 of the Survey Manual states that the “[t]he Code of Virginia (Section §33.2-1011) prescribes our rights for entering property for highway related purposes, and this right must not be abused. Every possible effort must be made by all parties entering the property to contact public and private property owners prior to entry.” This section also provides, “[i]f task is going to exceed the duration indicated on the ROE (Permission or Intent) letter, another letter shall be sent 30 days prior to the end of the original letters date unless the property owner is contacted and provides written permission for time extension.”<sup>5</sup>

Failure to follow policy is a Group II offense.<sup>6</sup> Grievant was aware of the Agency’s policy requiring permission to enter a landowner’s property. Grievant knew or should have

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<sup>2</sup> Agency Exhibit p. 194.

<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>4</sup> Agency Exhibit p. 261.

<sup>5</sup> Agency Exhibit p. 299.

<sup>6</sup> See, Attachment A, DHRM Policy 1.60.

known that permission to enter the properties had already expired. Mr. W's email and Contractor R's proposal mentioned that permission to enter the property had expired on June 26, 2020. Grievant had access to the Agency's spreadsheet which showed that permission to enter the properties had expired on June 26, 2020. Although Grievant knew that the Right of Entry had expired, he instructed Mr. R to enter the property to have the work done. Grievant did not obtain permission from the property owners. He did not delegate to his subordinates the responsibility for obtaining Right of Entry into the properties. The Agency has presented sufficient evidence to show that Grievant violated the Agency's Survey Manual thereby justifying the issuance of a Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an agency may remove an employee. Grievant has accumulated two Group II Written Notices. Accordingly, the Agency's decision to remove Grievant must be upheld.

Grievant argued that he did not send Mr. R and Mr. T to the properties. Mr. R testified that Grievant sent him out to the property. Grievant asked Mr. R if he could get the job done in a timely fashion. Mr. R said he would be able to complete the project by the end of the week or possibly by the beginning of the next week. This interaction can only be interpreted as direction for Mr. R to enter the property and timely complete work. Grievant was shocked that the work had not already been completed. Grievant had the opportunity to tell or remind Mr. R to obtain the necessary permission to enter the properties. By failing to do so, Grievant's comments served as an instruction to complete the work immediately without consideration of the procedures to obtain Right of Entry.

Grievant argued he trusted Mr. W to review the tracking spreadsheet. The evidence showed that Mr. W did not send the employees to the property. Mr. W informed Grievant on July 6, 2020 that the Right of Entry expired June 26, 2020. Mr. W was not involved in the decision-making thereafter.

Grievant argued the Agency's disciplinary action was excessive given his length of service and otherwise satisfactory work performance. Although the Agency could have corrected Grievant's behavior without removing him from employment, the Agency's decision was authorized by the Standards of Conduct.

*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 ...."<sup>7</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

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<sup>7</sup> Va. Code § 2.2-3005.

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 II Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

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

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

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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>[1]</sup>

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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*

Carl Wilson Schmidt, Esq.  
Hearing Officer