



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11641

Hearing Date: March 24, 2021
Decision Issued: June 8, 2021

PROCEDURAL HISTORY

On October 5, 2020, Grievant was issued a Group III Written Notice of disciplinary action with disciplinary demotion, transfer, and pay reduction for inappropriate use of a subcontractor's charge account and an individual's vacation property.

On October 30, 2020, 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 January 11, 2021, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 24, 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 Virginia Department of Transportation employed Grievant as a Residency Administrator at one of the Agency's locations. The purpose of his position was:

Ensure the coordination, integration and management of VDOT resources that impact the Residency program. Serve as the stewards of all things VDOT in assigned residency. Collaborate with and serve as the primary contact for local government and its liaison with VDOT functions. Manage resources allocated to the program to accomplish the objective. VDOT Department Memorandum (DM) Number: 16-1 – Role of the Residency should be used as a primary reference in fulfilling the purpose of the position.¹

Grievant had been employed by the Agency for over 20 years. No evidence of prior active disciplinary action was introduced during the hearing.

¹ Agency Exhibit p. 251

On September 6, 2018, the Agency authorized Grievant to engage in outside employment relating to self-employment for “Agriculture / Farm / Hunt Club / Wildlife Management / Tractor Repair / Farm Labor / Equipment / Vehicle Repair.”²

Grievant and Mr. C had been friends for approximately 20 years.

Mr. C and Ms. C are married. They have a Daughter. The Daughter is an adult who recently became a student in college in another state.

Mr. D was in charge of the Prime Contractor.

The LLC is a limited liability company formed on August 27, 2013. It is a Class A contractor that has 14 dump trucks and 10 pickup trucks. Ms. C is the Manager of the LLC and has the authority to sign contracts on behalf of the LLC. The LLC is owned by the Daughter. Mr. B is the Supervising Coordinator for the LLC. He manages the LLC’s daily operations including supervising approximately eight employees. Mr. B has been operating the company for approximately seven years. Mr. C was not an owner, agent, or representative of the LLC.

In September 2018, the Agency issued a bid for a “hired equipment” contract. In January 2019, two prime contracts were awarded by the Agency to the Prime Contractor. Four subcontractors including the LLC were included in the award. In November 2019, the Prime Contractor entered into two Short Form Standard Subcontracts with the LLC for work in two counties. The agreements required the LLC to provide labor, materials, equipment, and other facilities required to complete highway maintenance and repair under the Prime Contractor’s agreement with the Agency. Ms. C was listed as the contact person for the LLC. The LLC subcontract agreements were signed on February 20, 2020 by the Daughter on behalf of the LLC.

Work assignments for the Prime Contractor were initiated by VDOT. The Agency did not have a contractual relationship with any subcontractor so VDOT could not assign work directly to a subcontractor.

Mr. D was in charge of the Prime Contractor. He told an investigator that he did not know “the guys very well” when referring to the LLC, but he included the LLC as a subcontractor because Grievant and another Agency employee “pushed me into including [the LLC]” but that it was his “desire to include them initially.”³ Grievant denied causing Mr. D to include the LLC as a subcontractor. Grievant lacked the authority to determine who Mr. D selected as a subcontractor.

The LLC was also a prime contractor with the Agency relating to snow removal.

² Agency Exhibit p. 329.

³ Grievant’s Exhibit p. 68.

The LLC performed work assignments within the localities included in Grievant's residency.

Mr. B met with VDOT staff relating to Agency contracts with the Prime Contractor and the LLC. He met VDOT staff every one or two weeks. Mr. C attended the "original" meeting and one other meeting. The first meeting may have occurred in 2018 with the second meeting occurring approximately six months later. Mr. C's attendance at these meetings was at the request of Mr. D.

The Hunt Club was on approximately 40,000 acres owned by the Foundation. Mr. C leased the property from the Foundation. Grievant and Mr. C were members of a Hunt Club. Grievant had been a member of the Hunt Club since 1998 before he met Mr. C. The Hunt Club had approximately 100 members.

Grievant paid approximately \$750 per year to be a member of the Hunt Club. He was not an officer of the Hunt Club. On October 18, 2018, Grievant wrote a check payable to Mr. C in the amount of \$1,500. He wrote "Hunting Permit" on the memo line of the check. On May 20, 2020, Grievant wrote Mr. C a check in the amount of \$750. He wrote "Hunt Dues 2020" on the memo line of the check.

Members donated their time and equipment to maintain the Hunt Club property. Activities on the property included deer management, bush hogging, and helping members maintain and repair their personal equipment. The Hunt Club did not own any equipment. Grievant had equipment he owned located on Hunt Club property. Mr. C had vehicles and equipment on the Hunt Club property. Grievant worked on Mr. C's vehicles as well as those of other members. No evidence was presented showing Grievant received any compensation for his repair work.

The LLC had a revolving charge account at the Parts Store. The LLC employees would use the account to purchase parts for the LLC.

Grievant was authorized to make charges on the LLC's account at the Parts Store. Mr. C authorized Grievant to make the charges even though he did not have the legal authority to do so.

From January 1, 2019 to November 25, 2019, Grievant made approximately 34 purchases totaling \$4,537.37 from the Parts Store using the LLC's charge account.

Grievant would call the Parts Store and identify the items he wished to purchase or he would enter the Parts Store and then select or request the desired parts or items. He would ask a Parts Store employee to place the order on the revolving charge account of the LLC. Grievant would leave the Parts Store with the purchased items but without having used his own funds to pay for the parts. Grievant did not make any payments to the LLC to reimburse the LLC for items he purchased from the Parts Store using the LLC's charge account.

Grievant was assigned a State vehicle to operate while performing his work duties. He was not authorized to use the State vehicle to perform personal errands. On several occasions, Grievant used his assigned State vehicle to drive to the Parts Store and pick up parts. Grievant asserted he did so during his lunch breaks or after normal work hours.⁴

Grievant made repairs to vehicles and equipment located on the Hunt Club property. Grievant denied using the items from the Parts Store solely for his personal use. Grievant used many of the parts to repair vehicles of Mr. C. He used parts to repair equipment of other Hunt Club members. Grievant denied receiving payment or compensation for his repair work. No credible evidence was presented contradicting Grievant's denial of receiving a personal benefit from use of the parts.

Mr. C owned a Lake House in another state. Grievant stayed at the Lake House at least two times in the past five years. Grievant did not pay Mr. C for using the Lake House. The Agency did not determine the fair market rental value of the Lake House vacation property. On one of those occasions, Grievant and his Wife went to a concert in another location. They went by the Lake House so that Grievant could work on Mr. C's boat and jet ski. No evidence was presented showing Mr. C paid Grievant for working on Mr. C's boat and jet ski. Grievant and his Wife stayed at the Lake House overnight. Mr. C was not present at the Lake House during that time.

The Agency conducted an investigation. Grievant fully cooperated with the investigation. Grievant did not testify during the hearing.

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."⁵ 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."

DHRM Policy 1.60 lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense not specifically enumerated, that in the judgment of agency heads or their designees undermines the effectiveness of

⁴ Any use of the State vehicle to pick up parts at the Parts Store to use at the Hunt Club would have been unauthorized use of the State vehicle even if Grievant did so during his lunch break or after work hours. The evidence is not sufficient to establish a separate basis for misuse of State property. Grievant's access to and use of a State vehicle is significant because of the possible appearance of impropriety created when he picked up parts using the State vehicle.

⁵ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section.”

The Agency took disciplinary action against Grievant for two circumstances – (1) Grievant’s use of the Lake House and (2) Grievant’s purchase of parts from the Parts Store using the LLC’s revolving charge account.

Lake House. Grievant’s use of the Lake House does not give rise to disciplinary action. Mr. C was not a contractor with VDOT. Ms. C was not a contractor with VDOT. She was the manager of the LLC which was a contractor and subcontractor with VDOT, but her activities with the LLC appeared to be largely ministerial. The Agency did not show that the Lake House was rental property. There is no way to identify the value of Grievant’s use of the house. Grievant used the property two times in five years which is *de minimis*. It is unclear whether a separate legal entity, Mr. C, and/or Ms. C owned the property. The Hearing Officer does not believe that Grievant’s behavior as an Agency employee was affected by his use of the Lake House. His use of the Lake House did not give the appearance of impropriety.

Parts Store Charge Account. The Agency argued that creating a real or perceived conflict between an employee’s personal interest and the employee’s fiduciary duty to the Agency and Virginia taxpayers constitutes a basis for disciplinary action. In addition, the appearance of impropriety and gross lack of judgment constitutes a basis for disciplinary action, according to the Agency.

The minimum expectations for acceptable employee workplace conduct and performance include:

Comply with the letter and spirit of all state and agency policies and procedures, the Conflict of Interest Act, and Commonwealth laws and regulations. ***

Conduct themselves at all times in a manner that supports the mission of their agency and the performance of their duties.⁶

Under VDOT’s Code of Ethics, Grievant was expected to:

- Commit to be a trusted steward of public resources
- Act with integrity in all relationships and actions in the work environment
- Abide by Virginia’s Standards of Conduct for employees
- Not engage in conflicts of interest between my private interest and my professional role
- Not use public resources for personal gain

⁶ See, DHRM Policy 1.60.

- Not accept or give gifts in violation of the State and Local Government Conflict of Interests Act.

Code of Virginia § 2.2-3103 is part of the State and Local Conflict of Interest Act. Under this section:

No ... employee of a state ... shall:

1. Solicit or accept money or other thing of value for services performed within the scope of his official duties, except the compensation, expenses or other remuneration paid by the agency of which he is an officer or employee. This prohibition shall not apply to the acceptance of special benefits that may be authorized by law; ***
3. Offer or accept any money or other thing of value for or in consideration of the use of his public position to obtain a contract for any person or business with any governmental or advisory agency;
4. Use for his own economic benefit or that of another party confidential information that he has acquired by reason of his public position and which is not available to the public;
5. Accept any money, loan, gift, favor, service, or business or professional opportunity that reasonably tends to influence him in the performance of his official duties. This subdivision shall not apply to any political contribution actually used for political campaign or constituent service purposes and reported as required by Chapter 9.3 (§ 24.2-945 et seq.) of Title 24.2;
6. Accept any business or professional opportunity when he knows that there is a reasonable likelihood that the opportunity is being afforded him to influence him in the performance of his official duties; ***
8. Accept a gift from a person who has interests that may be substantially affected by the performance of the officer's or employee's official duties under circumstances where the timing and nature of the gift would cause a reasonable person to question the officer's or employee's impartiality in the matter affecting the donor. Violations of this subdivision shall not be subject to criminal law penalties;

Real or perceived conflicts, the appearance of impropriety, and gross lack of judgment form a basis for disciplinary action under the Standards of Conduct because they may undermine the Agency's ability to operate in accordance with its mission of serving Virginians and damage the Agency's reputation for fairness, honesty, and efficiency. This behavior is contrary to the spirit of Va. Code § 2.2-3013. An objective of Va. Code § 2.2-3013 is to ensure that Virginians maintain "the highest trust in their public officers and employees" and "are entitled to be assured that the judgment of public officers

and employees will be guided by a law that defines and prohibits inappropriate conflicts and requires disclosure of economic interests.”⁷ Whether this behavior rises to the level of a Group III offense depends on its severity.

The Agency has presented sufficient evidence to establish a basis for disciplinary action. Grievant received gifts from the LLC because he obtained parts from the Parts Store using the LLC’s revolving charge account. Grievant did not pay for the parts. It does not matter for what purpose he used the parts.⁸ Grievant knew that he was receiving parts from the LLC’s revolving account and that the LLC was a subcontractor receiving money for its participation in a contract between VDOT and the Prime Contractor. The LLC provided a special privilege to Grievant. The nature of the gifts would cause a reasonable person to question Grievant’s impartiality in the Agency’s dealings with the LLC. A reasonable person could question whether the Agency’s procurement process was fair and efficient.

Grievant had a long-standing friendship with a successful member of his community. The Hearing Officer does not believe the gifts Grievant received from the LLC affected his interaction with the LLC. In other words, it is likely that even if Grievant had not received gifts from the LLC, his favorable view of and relationship with Mr. C and the LLC would have been the same. The gifts from the LLC did not induce Grievant to behave differently in his official duties. He already favorably viewed the LLC because of its association with Mr. C’s family members. Nevertheless, Grievant’s receipt of gifts provides a basis for disciplinary action because a reasonable person could perceive the gifts as payment for maintaining a business relationship with the LLC. A reasonable person could perceive the gifts as causing Grievant to treat the LLC differently from other VDOT subcontractors. The perception Grievant created forms a basis for disciplinary action.

The Agency has presented sufficient evidence to show that Grievant’s behavior rose to the level of a Group III offense. The Agency’s work is divided among nine Districts. Within each District are several Residencies. A Residency Administrator is in charge of all of the Agency’s operations within the residency. As Residency Administrator, Grievant was the “face of VDOT” in the counties within his residency. He worked with local leaders and citizens in these counties. He was responsible for promoting an environment free from the appearance of impropriety. The degree to which Grievant could damage the Agency’s reputation was immediate and significant. Grievant was responsible for overseeing the Agency’s contract with the Prime Contractor. He was in a position to initiate work with the Prime Contractor that directly benefited the LLC.⁹ This is true even

⁷ See, Va. Code § 2.2-3100.

⁸ Grievant did not assert or establish that Mr. C paid for the parts and Grievant used the parts solely to repair the equipment of Mr. C. In other words, Grievant did not establish that Mr. C used the LLC’s revolving charge account as a method or pretext for completing his personal transactions.

⁹ For example, Grievant held a position where a primary contractor could allege he pressured the primary contractor to select a specific subcontractor as occurred in this case. Although there is not sufficient evidence for the Hearing Officer to conclude that Grievant pressured the Prime Contractor to select the

though Grievant was not the Contract Administrator who would assign specific tasks to the Prime Contractor. Grievant's leadership position meant the Agency could hold him to a higher standard than other employees.

Upon the issuance of a Group III Written Notice, an agency may remove an employee. In lieu of removal, an agency may demote, transfer, and impose a disciplinary pay reduction. Accordingly, the Agency's decision to demote, transfer, and impose a disciplinary pay reduction must be upheld.

Grievant argued that the Agency relied on incorrect information about Mr. C's involvement in the LLC. Although Grievant has established this defense in part, there remains sufficient evidence to support the disciplinary action.

Grievant argued that he did not make 34 purchases totaling \$4,537.37 from the Parts Store using the LLC's charge account as alleged by the Agency. Grievant presented evidence that the LLC employed a worker who also had Grievant's initials and that employee could have made the purchases. The record showed that Grievant admitted to purchasing items on the LLC revolving charge account. Whether it was some amount less than \$4,537.37 is not significant. Even if another person with Grievant's initials made some of the purchases, there remains sufficient evidence to show that Grievant freely purchased items from the Parts Store using the LLC's revolving charge account and that Grievant did not pay for those purchases. His use of the charge account was material.

Grievant argued that the disciplinary action was excessive. Although the Agency could have taken lesser disciplinary action, it has established a level of discipline within 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"¹⁰ 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.

LLC, the perception that someone in his position could do so is significant. It illustrates the importance of avoiding the appearance of impropriety.

¹⁰ Va. Code § 2.2-3005.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion, transfer, and disciplinary pay reduction 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 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 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.^[1]

[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].

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer