

Issue: Group II Written Notice with Suspension (abuse of State time and unauthorized use of State vehicle); Hearing Date: 01/07/19; Decision Issued: 01/08/19; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 11277; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11277**

Hearing Date: January 7, 2019

Decision Issued: January 8, 2019

#### **PROCEDURAL HISTORY**

On June 18, 2018, Grievant was issued a Group II Written Notice of disciplinary action with a five workday suspension for abuse of State time and unauthorized use of State property.

On July 18, 2018, 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 October 22, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On January 7, 2019, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency 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 employs Grievant as Senior Permits Inspector. He has been employed by the Agency for approximately 17 years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant began reporting to the Supervisor in April 2017 but he continued to receive his work assignments from the Specialist. When Grievant needed to take leave, he would notify the Specialist and obtain approval.

Grievant was assigned a State-owned pickup truck to perform his duties which involved traveling to locations throughout certain counties to inspect new street additions, county bond projects, and additions into the State Secondary System. He typically travelled from his home to the Residency to obtain the State vehicle and then began his inspection duties. Grievant's work vehicle was his "mobile office."

After receiving complaints from some of Grievant's co-workers, the Manager initiated a process for a GPS tracking device to be placed on Grievant's State-owned truck. The Manager later reviewed the data showing the vehicle's movement and parked locations.

Grievant spoke with the Specialist and asked permission to travel to his medical appointment that would be “ten minutes, in and out” to have blood drawn. The Specialist knew Grievant would be operating his assigned vehicle and approved Grievant’s request.

On April 17, 2018, Grievant entered the State-owned pickup truck at 8:00 a.m. and drove 12.8 miles to the Medical Office.<sup>1</sup> His appointment was scheduled at approximately 9:15 a.m. He arrived at 8:30 a.m. He waited in the vehicle for several minutes performing work duties including organizing his files. He went into the Medical Office and asked if he could be taken early. He was taken early and then left the Medical Office at 9:15 a.m. to resume his work duties. Grievant extended the end of his work shift to ensure that he worked eight hours that day.<sup>2</sup>

Grievant held an account at the Bank. The Bank had a Bank Location within a county where Grievant performed inspections. Grievant stopped by the Bank Location even when there were no permit inspections for him to conduct near the Bank Location. On April 18, 2018, April 19, 2018, April 23, 2018, April 26, 2018, April 30, 2018, May 1, 2018, May 4, 2018, and May 7, 2018 he drove his State vehicle to the Bank Location to perform personal banking tasks. Grievant did not have permission to perform personal banking tasks while operating the State vehicle.

### **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.”

Policy 1-16 governs VDOT Department Policy Memorandum (DPM) Manual, Vehicle Assignment and Use Policy. This policy provides:

All trucks owned by VDOT, as well as those vehicles rented through the Department of General Services’ Office of Fleet Management Services’

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<sup>1</sup> Grievant claimed but did not establish that he performed work duties on the way to the medical appointment.

<sup>2</sup> The Agency’s claim that Grievant falsified his time sheet is not supported by the evidence. Grievant was allowed to extend his work shift when necessary to ensure he completed eight hours per day. The Agency’s assertion that he needed permission to extend his shift is not persuasive. Thus, Grievant’s representation that he worked eight hours on April 17, 2018 was not disproven by the Agency.

<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.

(OFMS) rental contract (currently Enterprise, rented through VDOT's short-term equipment rental contracts, and OFMS Leased Fleet Vehicles assigned through the OFMS Centralized Fleet are provided for the conduct of official state duties and are not to be used for personal business. Employees who drive state vehicles should remember that they are observed by, and set examples for, the general public. Safe and courteous driving should always be practiced.<sup>4</sup>

The Office of Fleet Management Services within the Department of General Services establishes the policy for all vehicles owned by the Commonwealth. Under OFMS policy:

Drivers shall use state-owned vehicle for official state business only. Drivers guilty of misuse are subject to disciplinary action by their agency and may lose their privilege to operate state-owned vehicle[s]. Vehicles are to be operated in a manner which avoids even the appearance of impropriety.<sup>5</sup>

On April 17, 2018, Grievant drove his State-owned pickup truck to a medical appointment that was not work-related. He obtained permission from the Specialist to deviate from policy but that permission was limited to "ten minutes in and out" as part of his regular duties. It appears that Grievant drove directly to his medical appointment without performing any work duties and remained there for more than ten minutes. On April 18, 2018, April 19, 2018, April 23, 2018, April 26, 2018, April 30, 2018, May 1, 2018, May 4, 2018, and May 7, 2018 he drove his State vehicle to the Bank Location to perform personal banking tasks. Grievant acted contrary to the above policies because he performed personal errands while in a State-owned vehicle whose use was restricted to State business. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten work days. Accordingly, Grievant's five work day suspension must be upheld.

Grievant argued that he did not have adequate notice of the policies governing his use of the State-owned vehicle. The Agency established that the policies were available to VDOT staff through its intranet. Although Grievant may not have known the specific terms of each policy, the policies were available to him thereby constituting adequate notice.

Grievant argued that the Agency did not engage in progressive disciplinary action and that the Agency could have given him a warning that would have corrected his behavior without imposing disciplinary action. Although agencies are encouraged to take progressive disciplinary action, they are not required to do so as a precondition to

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<sup>4</sup> Agency Exhibit 13.

<sup>5</sup> Agency Exhibit 14.

taking disciplinary action. In this case, the Agency elected to take disciplinary action and its decision was consistent with the Standards of Conduct. The Agency's action was consistent with how it treated other employees engaging in similar behavior.

*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>6</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. 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 a five workday suspension is **upheld**.

## APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and 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.

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<sup>6</sup> *Va. Code § 2.2-3005.*

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>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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