

Issue: Group III Written Notice with Termination (unauthorized removal of State property); Hearing Date: 05/16/13; Decision Issued: 05/17/13; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10070; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10070

Hearing Date: May 16, 2013

Decision Issued: May 17, 2013

PROCEDURAL HISTORY

On February 21, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for unauthorized removal of State property.

On March 19, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 8, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 16, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
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 Corrections employed Grievant as an Institutional Safety Specialist. He began working for the Agency on April 11, 2005. He signed a "Conditions of Employment" form agreeing to "become familiar and comply with ... DOC Administrative Procedures Manual and Division and Institutional Operating Procedures." The document also stated, "All employees must read and comply with the Standards of Conduct and Performance for State Employees."¹

Grievant had a fire extinguisher refurbishing business outside of his employment with the Agency. He also operated a music playing business.

One of Grievant's duties included verifying that fire extinguishers at the Facility were not too old to be used at the Facility. Every six years, fire extinguishers at the Facility were removed from operation and rebuilt. After the Agency owned fire extinguishers for 12 years, the Agency chose to replace the fire extinguishers because it was more cost effective to purchase a new fire extinguisher than to refurbish a 12 year old fire extinguisher.

Grievant identified 15 older fire extinguishers that he believed the Agency would replace with new fire extinguishers rather than refurbishing. He removed those fire extinguishers from the Facility. He refurbished the extinguishers and sold them as part

¹ Agency Exhibit 5.

of his private business. Grievant did not ask permission from any of the Facility's managers to remove the items.

Grievant believed he was saving the Facility money. He did not intend to steal the extinguishers from the Agency. He believed he was acting to benefit the Agency, not hurt it. He contacted a recycling contractor for the Facility and the contractor's representative said that the extinguishers could not be recycled cost effectively.

Grievant approached other institutions and spoke with staff holding the same position Grievant held and asked them for fire extinguishers. They gave fire extinguishers to Grievant.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three groups, according to the severity of the behavior. Group I offenses "include types of behavior less severe in nature, but [which] require correction in the interest of maintaining a productive and well-managed work force."² Group II offenses "include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal."³ Group III offenses "include acts and behavior of such a serious nature that a first occurrence normally should warrant removal."⁴

"[U]nauthorized removal of ... state property ..." is a Group III offense.⁵ The Agency purchased fire extinguishers for use at the Facility where Grievant worked. The fire extinguishers were Agency property. Grievant removed approximately 15 fire extinguishers without having obtained permission from Agency managers. Grievant was not authorized to remove fire extinguishers for his own use. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice an agency may remove an employee. Accordingly, the Agency's decision to remove Grievant must be upheld.⁶

Grievant argued that removing aged fire extinguishers was economically efficient and beneficial to the Facility. Grievant argued that institutional safety officers at other facilities responded favorably to his request for expired fire extinguishers and they

² Virginia Department of Corrections Operating Procedure 135.1(V)(B).

³ Virginia Department of Corrections Operating Procedure 135.1(V)(C).

⁴ Virginia Department of Corrections Operating Procedure 135.1(V)(D).

⁵ Virginia Department of Corrections Institutional Operating Procedure 135.1(D)(2)(d).

⁶ The Agency argued that Grievant used his computer inappropriately for personal business. Given that the Agency's evidence at most would justify issuing a Group II Written Notice and the Agency has established a separate basis for a Group III Written Notice, it is not necessary for the Hearing Officer to address the underlying facts relating to Grievant's use of the Agency's computer equipment.

sent him fire extinguishers they could no longer use. Although it may be true that the Facility was better off not having to dispose of 12 year old fire extinguishers and that employees at other facilities recognized this benefit, the decision of how to dispose of aged fire extinguishers rested solely with Facility managers acting in accordance with DOC policies governing the disposition of surplus property. Grievant assumed the role of an agency decision-maker without having the authority to do so. Grievant's removal of the fire extinguishers was not authorized by the Agency. Whether institutional safety officers at other facilities obtained permission from their facility manager's is not known and it would not affect Grievant's obligation to obtain permission from managers at his Facility.

The Agency argued that Grievant acted contrary to its surplus property policy. Grievant argued that he was not made aware of the Agency's surplus property policy and, thus, should not receive disciplinary action. It is unnecessary for the Hearing Officer to consider the Agency's surplus property policy. The Agency's Standards of Conduct specifies that unauthorized removal of State property is a Group III Offense. Grievant signed a Conditions of Employment form in 2005 stating, "All employees must read and comply with the Standards of Conduct and Performance for State Employees."⁷ Grievant knew or should have known of the Standards of Conduct. The Agency's Standards of Conduct provided the basis for the disciplinary action against him.

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"⁸ 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 argued that the disciplinary action should be mitigated due to his outstanding work performance. Although Grievant had good work performance with the Agency, his work performance was not sufficient to mitigate the disciplinary action under EDR's mitigation standard would not allow for mitigation based on Grievant's work performance. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁷ Agency Exhibit 5.

⁸ 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 removal is **upheld**.

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 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.

2. 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.⁹

[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

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.