

Issue: Group III Written Notice with Termination (unauthorized removal of State property); Hearing Date: 01/07/14; Decision Issued: 01/27/14; Agency: VCCS; AHO: Ternon Galloway Lee, Esq.; Case No.10233; Outcome: No Relief – Agency Upheld.

# **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 10233**

**Hearing Date: January 7, 2014**

**Decision Issued: January 27, 2014**

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## **SUMMARY OF DECISION**

The Agency had found Grievant engaged in misconduct by failing to follow instructions and/or policy and by engaging in the unauthorized use of state property. The Agency then issued Grievant a Group III Written Notice with termination. The Hearing Officer found Grievant failed to follow policy regarding scrapped materials of the Agency and engaged in the unauthorized use of State property. She determined the behaviors were misconduct and constituted two Group II offenses, sufficient to warrant termination. Thus, the Hearing Officer upheld the Agency's termination.

## **HISTORY**

On October 30, 2013, the Agency issued Grievant a Group III Written Notice with termination for not following instructions or policy and engaging in the unauthorized use of state property. On November 6, 2013, Grievant timely filed his grievance to challenge the Agency's action. On December 2, 2013, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. Based on available dates and times provided by the parties, the Hearing Officer scheduled the hearing for January 7, 2014.<sup>1</sup>

The day before the scheduled hearing, the Hearing Officer's assistant placed courtesy telephone calls to the Agency's Advocate and Grievant reminding the parties of the date and time of the hearing.<sup>2</sup> On the date and scheduled time for the hearing the Agency appeared, but Grievant did not. Before beginning the hearing, the Hearing Officer telephoned Grievant and again left him a voice mail message informing him the Agency and Hearing Officer were located at the hearing site and ready to commence the grievance hearing. The hearing was postponed for about 15 minutes to allow Grievant time to arrive or make telephone contact. Grievant did not call in nor show for the proceeding. Thus, the Hearing Officer held the hearing in his absence.

During the course of the hearing proceedings, the Agency was given an opportunity to present matters of concern to the Hearing Officer, make opening and closing statements, and call

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<sup>1</sup> The Hearing Officer received available dates and times from both parties for a telephonic prehearing conference (PHC) and the grievance hearing. Consistent with the parties' availability, the proceedings were then set for December 20, 2013, at 3:00 p.m. and January 7, 2014, at 10:00 a.m., respectively. The parties were then notified. The Hearing Officer contacted the Agency's advocate at the set time for the PHC. Several attempts were made to contact the Grievant without success. Thus, no PHC was held. In addition, previous scheduled PHCs could not be held for the same reason as well as Grievant not responding to the Hearing Officer's request for his available dates.

<sup>2</sup> Grievant had previously confirmed the telephone number that the Hearing Officer's Assistant dialed was his. When the call was placed, he did not answer; however a voice mail reminder was left.

witnesses. Moreover, the Hearing Officer admitted Agency Exhibits 1 through 6 and the Hearing Officer's exhibit.

During the hearing, an advocate represented the Agency.

### **APPEARANCES**

Advocate for Agency

Witnesses for the Agency (3 witnesses, including the Agency's Advocate)

Grievant did not appear

### **ISSUE**

Was the written notice warranted and appropriate under the 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 Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8(2). 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 all the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

1. The Agency is a community college that consists of several campuses. Grievant had been employed by the Agency in the Department of Facilities Management since 1994. In 1997/98, Grievant became the foreman in that department at Campus 1. (A Exh. 1, p. 6; A Exh. 4, p. 1).
2. From 1997/1998 to about December 2012, the Agency permitted employees in the Department of Facilities Management to take scrap material from the Agency and sell it to a Recycling Place for cash. The funds from the sales were held in a petty cash fund (Fund) under the control of Grievant. The employees were allowed to use the Fund for luncheons and meals for the employees of that department. Grievant acknowledged he received at least one loan of \$1,600.00 from the petty cash fund. The scrap materials consisted of motors, aluminum, copper and other materials considered unusable/scrap. (A Exh. 1, pp. 5 – 10; A Exh. 2, p. 1; A Exh. 3, p. 1; A Exh. 4, pp. 1 - 2).
3. In 2012 the Agency changed its policy regarding scrap removal. Management instructed Grievant and other employees that removing scrap materials from the college to exchange them for cash was prohibited. Under the new policy scrapped materials were to be taken to the

Agency warehouse for disposal or put in the trash. This new policy specifically prohibited the removal of the materials from the campus to sell for cash.<sup>3</sup> This instruction was provided to Grievant by his immediate supervisor, the Manager of the Department of Facilities Management and by the Director of that department. Grievant acknowledged he understood the policy. (A Exh. 2, p. 1; A Exh. 3; A Exh. 6; Testimonies of Human Resource Director and Director of Facilities Management).

4. Regardless of the new policy, Grievant removed scrapped materials from the Agency in exchange for cash on three occasions in 2013; April 2, 2013, April 23, 2013, and August 14, 2013. (Testimony of Human Resource Director; A Exh. 1, p. 9).

5. The Agency became aware of Grievant's continued scrapping on August 14, 2013, through an anonymous telephone call. The caller indicated that someone from the Agency was exchanging scrapped materials from the college for cash at the Recycling Place. The Director of the Department of Facilities Management then confirmed with the Recycling Place that it had received scrap in exchange for cash from an Agency employee. Upon visiting the Recycling Place, the Director of Facilities Management determined that on August 14, 2013, Grievant had sold the scrap metal/materials for \$162.45. Further, the Agency learned that the Grievant held an account with the Recycling Place for the purpose of exchanging scrapped materials for cash. The account history demonstrated that Grievant had exchanged scrap for cash on three occasions in 2013. The 2013 exchanges occurred after Greivant was provided instructions by his superiors to cease the practice. Grievant admitted that he used \$42.45 of the money he received on August 14, 2013, to put gas in his personal vehicle. (Testimonies of Directors of Facilities Management and Safety and Security; A Exh. 1, p. 6; A Exh. 3, p. 2).

6. Management then launched an internal investigation whereby it conducted interviews with employees of the Department of Facilities Management. Most, if not all, staff in the department were interviewed to include, Grievant. (A Exh. 1).

7. The investigation revealed that from 2010 until August 14, 2013, scrapped materials had been removed from the Agency and taken by Grievant to the Recycling Place in exchange for cash. During this time period, at least \$3,200.05 had been obtained by the scrapping activity at the Agency. (A Exh. 1, p. 9).

8. Further, the investigation showed that funds received were placed in a petty cash fund held by Grievant. At least through 2012, the funds were used for the most part to pay for luncheons and meals for the employees of the Facilities Management Department. (A Exhs. 2, 3, and 4). At least one loan of \$1,600.00 was reported to have been made from the funds to Grievant. (A Exh. 1, p. 10). For the most part, receipts were not retained showing the use of the petty cash funds. (A Exh. 2, p. 1).

9. At the conclusion of the investigation, management issued Grievant a Group III Written Notice with termination for not following policy/instructions and for using state property without authorization. The notice specifically describes Grievant's offenses as follows:

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<sup>3</sup> The Hearing Officer finds that the evidence is sufficient to show the scrapping policy changed in 2012, but the evidence was inadequate to establish the exact date of the 2012 amendment.

[Grievant] removed state property from the [Campus] and sold it as scrap material, receiving cash for it. He maintained the proceeds from the scrapping transactions in a departmental petty cash fund ("Fund") in his personal locker at the campus. He conducted the scrapping transactions and maintained the Fund with the knowledge and consent of his supervisor, Campus Facilities Manager. [Grievant] did not maintain accountability documentation of the cash receipts from the scrapping transactions or of the expenditures from the Fund. Available documentation indicates that at least \$4800.05 passed through the Fund between April 2010 and August 2013, of which only \$262.45 can be accounted for. [Grievant] took a personal loan of \$1,600.00 from the Fund; no records exist that document that the loan was repaid in full. [Grievant] used \$42.45 from the proceeds of the August 15, 2013 scrapping transaction to refuel his personal vehicle. [Grievant] was aware that the Director of Facilities Management & Services had directed that scrap materials be disposed of through the college's Warehouse but continued to conduct scrapping transactions. And in receiving cash for the scrapping and maintaining the Fund, he violated [Community College] Policy 4201 (Tuition, Fees, and Other Receipts) in that he is not authorized to receive funds on behalf of the college and the funds received were neither properly recorded in the college accounting system nor deposited in an appropriate bank account.

(A Exh. 1, p. 2).

10. In describing the offenses, the disciplinary notice also referenced the investigative report and attached it to the written notice. (A Exh. 1, p. 2).

### **Policy 4201**

11. Regarding Policy 4201, its written text indicates an effective date of January 20, 2011. Under Policy 4201, the Agency is required to properly account for, report, and manage deposits of revenue and other receipts as approved by the Virginia Department of Treasury. (A Exh. 5, pp. 1-2).

12. Policy 4201 also prohibits a department of the Agency from collecting, depositing, and recording payments if its Vice-President for Finance has not authorized that department to receive funds on behalf of the Agency. (A Exh. 5, p. 1).

13. In addition, Policy 4201 mandates that "[a]ll receipts of revenue and other funds of the Commonwealth shall be recorded according to state revenue classification codes and deposited in a bank approved by the Virginia Department of Treasury to the credit of the Treasurer of Virginia." (A Exh. 5, p. 1).

14. Under Policy 4201, non-state funds received must be recorded in the accounting system to the appropriate revenue classification code and deposited to the Agency's local bank account. (A Exh. 5, pp. 1-2).

15. Policy 4201 requires that revenue/funds received be processed on the day received, but

not later than the next banking day. (A Exh. 5, p. 2).

16. The Agency's evidence was insufficient to establish Policy 4201 had been implemented and/or Grievant was aware of it on or before August 14, 2013.

### **Other**

17. Grievant has no prior formal disciplinary actions of record. (Testimony of Director of Facilities Management).

18. The Agency considered mitigating Grievant's discipline, but determined mitigation was inappropriate due to Grievant repeatedly disobeying the scrapping policy and due to Grievant having a history of not following other procedures such as use of his Agency credit card (P-card). (Testimony of Director of Facilities Management).

### **DETERMINATIONS AND OPINION**

The General Assembly enacted the *Virginia Personnel Act*, VA. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

Va. Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>4</sup>

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (Policy 1.60). The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work

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<sup>4</sup> GPM §5.8

performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Policy 1.60 categorizes offenses in three groups. Group I offenses are less severe. Group II offenses are more severe. Further, an accumulation of two Group II offenses normally warrants the termination of an employee. The third category of offenses are identified as Group III offenses. A first occurrence normally warrants dismissal.

On October 30, 2013, management issued Grievant a Group III Written Notice with termination for (i) failure to follow instructions and/or policy and (ii) the unauthorized use of state property. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

## **I. Analysis of Issue before the Hearing Officer**

**Issue: Whether the discipline was warranted and appropriate under the circumstances?**

**A. Did the employee engage in the behavior described in the Group III Written Notice and did that behavior constitute misconduct?**

**1. Did the Grievant (i) Fail to Follow Instruction/Policy and (ii) Use State Property without Authorization?**

The Agency contends that Grievant failed to follow policy and that he used state property without authorization.

The evidence shows that for many years the Agency permitted employees of the Department of Facilities Management (Department) to remove scrapped/unusable materials from the Agency and sell them for cash - scrapping. Grievant was the employee who took the materials from the Agency and exchanged them for cash at the Recycling Place. The evidence shows that the funds from the sales were maintained in a petty cash fund that was held by Grievant. Further, much of money from the sales was used to pay for luncheons and meals for the employees within the department.

The evidence also demonstrates that sometime in 2012, the above-referenced practice was changed. The Agency implemented a new policy precluding the scrapping practice. Specifically, in 2012, Grievant's immediate supervisor and the director of the Department of Facilities Management instructed staff that scrapping was prohibited. Also, employees were instructed that scrapped materials were to be sent to the Agency's warehouse or put in the trash. The evidence indicates that Grievant admitted he knew of the changed policy, effective 2012, and understood it. Yet on three different occasions in 2013, Grievant disobeyed this policy and his supervisor's instruction and removed scrapped materials and sold them to the Recycling Place. What is more, he transported the scrapped materials using the Agency's vehicle. Further, the evidence shows that on August 14, 2013, the last day he sold scrapped materials, Grievant used some of the cash obtained to fuel his personal vehicle.

The Hearing Officer finds that the Agency's 2012 policy precluding scrapping and its directive requiring scrapped materials to be taken to the Agency warehouse indicate it had not abandoned any scrapped materials. Therefore scrapped materials remained Agency property. Thus, the Hearing Officer finds that Grievant's selling the Agency's scrapped property and using the Agency's vehicle to facilitate the transaction constitute the unauthorized use of state property.

Bearing in mind the above evidence, the Hearing Officer finds Grievant knowingly disobeyed policy implemented in 2012 precluding scrapping. And he used state property without authority.

## **2. Did Grievant Fail to Follow Policy 4201?**

Moreover, the Agency contends Grievant failed to follow the mandates of Policy 4201. The Agency's evidence was not sufficient to show Grievant violated Policy 4201.

### **B. Was the discipline consistent with policy and law?**

The Agency issued Grievant a Group III with termination. The Hearing Officer has found Grievant knowingly failed to follow his superiors' instructions on three occasions. Under the Standards of Conduct Policy No. 1.60 this behavior constitutes a Group II offense. That said, the evidence also shows that Grievant engaged in the unauthorized use of state property. This also is a Group II offense under the Standards of Conduct. Under Policy 1.60, if an employee accumulates two Group II offenses, the Agency may terminate his employment. Here Grievant's conduct amounted to two Group II offenses. Thus, the Hearing Officer finds the termination is consistent with policy.

## **II. Mitigation**

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution ["EDR"]."<sup>5</sup> EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a super-personnel officer" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."<sup>6</sup> More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and

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<sup>5</sup> Va. Code § 2.2-3005 and (c)(6)

<sup>6</sup> *Rules for Conducting Grievance Hearings* VI(A)



- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>7</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant's behavior established that he committed two Group II offenses and that termination for those offenses is consistent with policy.

Next, the Hearing Officer considers whether the discipline was unreasonable. The Hearing Officer has carefully deliberated and considered all evidence, to include the Agency determination to not mitigate the discipline due, in part, to Grievant repeatedly disobeying the policy. The Hearing Officer finds the repeated misconduct an aggravating factor. She also notes Grievant presented no evidence supporting lessening the discipline.

Having undergone a thorough consideration of all the evidence, the Hearing Officer finds the Agency's decision to terminate Grievant is reasonable.

### **DECISION**

Hence for the reasons stated here, the Hearing Officer finds Grievant committed two Group II offenses. And she upholds the Agency's discipline.

### **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  
Departmental of Human Resource Management  
101 N. 14th St., 12<sup>th</sup> 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

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<sup>7</sup> *Rules for Conducting Grievance Hearings VI(B)*

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 N. 14th 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 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.<sup>8</sup>

Entered this 27<sup>th</sup> day of January, 2014.

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Ternon Galloway Lee, Hearing Officer  
cc: Agency Advocate  
Agency Representative  
Grievant  
Hearings' Program Director of EDR

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<sup>8</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.