

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 01/27/14; Decision Issued: 02/14/14; Agency: DOC; AHO: Ternon Galloway Lee, Esq.; Case No. 10248; Outcome: Full Relief.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10248

Hearing Date: January 27, 2014

Decision Issued: February 14, 2014

SUMMARY OF DECISION

The Agency had found that Grievant's work performance was unsatisfactory between December 2012, and January, 2013. The Agency then issued Grievant a Group I Written Notice. The Hearing Officer found the Agency could not meet its burden and rescinded the Group I Written Notice.

HISTORY

On July 2, 2013, the Agency issued Grievant a Group I Written Notice for unsatisfactory job performance. On or about August 1, 2013, Grievant timely filed his grievance to challenge the Agency's action. On December 18, 2013, the Office of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A prehearing conference ("PHC") was held on January 9, 2014, and an order addressing topics discussed during that PHC was issued on January 16, 2013. The order also set the hearing for January 27, 2014, as agreed to by the parties during the PHC.¹

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. Then the Hearing Officer swore in the witnesses and admitted Agency Exhibits 1 through 6. Grievant was provided an opportunity to submit exhibits but declined to do so.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate and the Grievant represented himself.

APPEARANCES

Advocate for Agency

Witnesses for the Agency (2 witnesses)

Grievant

Witnesses for Grievant (1, the Grievant)

ISSUE

¹ This was the first date that both parties were available for the hearing.

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 who testified in person at the hearing, the Hearing Officer makes the following findings of fact:

1. The Agency is a prison. Grievant has worked for the Agency for 15 years providing exemplary service. (A Exh. 1). In November 2012, the Agency assigned Grievant to its Armory Division. (Testimonies of Grievant and Sergeant 1). During the first month of his new post, Grievant was not physically located in the Armory because he was in training. (Testimonies of Sergeant 1 and Grievant).
2. The responsibilities of staff assigned to the Armory include maintaining an inventory of items in this department that are loaned to employees for usage in the course of their employment. Credit cards for the purchase of gas are included in the aforementioned items that are housed at the Armory and that may be assigned to employees to facilitate their performing work related tasks. (Testimonies of Sergeant 1 and Grievant; A Exh. 4).
3. During September/October 2012, some staff in the Armory determined that several gas cards kept in the Armory were missing. (Testimonies of Sergeant 1 and Grievant).
4. About January 2013, the Agency’s headquarters became aware of concerning activities involving one of the missing cards. By an internal investigation launched, the Agency eventually determined that a card was stolen by an employee who was terminated in October 2012. Activities on the card were flagged because charges placed on it were excessive – about \$30,000.00 - and the purchases made were for gas and diesel fuels. This was suspicious because the card was designated to be used only for gas purchases. The headquarters reported the activities to the Agency. (Testimony of Sergeant 1).
5. In December 2012, Grievant was informed by Sergeant 2 that gas cards were missing, and had been since September/October 2012. Grievant was also notified that an incident report had been submitted regarding the missing gas cards. Grievant was additionally informed by his superior, the Lieutenant, that the Lieutenant would discuss the missing gas cards with the Lieutenant’s superior. (A Exh. 3, pp. 1- 2; Testimonies of Sergeant 1 and Grievant).

Upon assuming his initial, physical post at the Armory in December 2012, Grievant reasonably believed that any cards, that had been discovered missing or stolen two months prior,

had been reported up the chain of command. In addition, he believed that no requirement existed for him to submit an incident report about the missing gas cards. (Testimonies of Sergeant 1 and Grievant).

6. Grievant would not have been privy to information indicating the type of purchases made on the stolen gas card and the excessive charges as that information was provided solely to the financial manager for the Agency. (Testimony of Sergeant 1).

7. Because Grievant did not submit an incident report regarding the missing gas card once he learned of it, the Agency issued him a Group I Written Notice for unsatisfactory job performance. In pertinent part, the written notice describes Grievant's offense as follows:

SIU case file 130029STB determined that a Voyager fuel card, assigned to a facility [vehicle] pickup truck (vehicle [####]) was missing from the agency Armory inventory and used from 10/ 11/12 through 1/8/13 resulting in fraudulent purchases of gasoline and diesel fuel in the amount of \$26,380.48. The suspect in the fraudulent use was [Former Employee], an employee from who was terminated from employment on 10/10/12.

C/O [Grievant] provided a written statement regarding his knowledge of this incident. He indicated he worked on the Armory as tool control officer since mid-December 2012. He indicated he was told that the gas card for the [vehicle] was missing. He further indicated he did not report this to anyone because he just accepted the fact that the gas card was missing, and he figured it had already been reported. The failure to report this significant issue via a written incident report, which would require approval at the watch commander level of supervision, constitutes Inadequate or Unsatisfactory Job Performance.

8. The Agency presented Agency Policy No. 038.1 Reporting Serious or Unusual Incidents. The Policy indicates it became effective on September 1, 2013, and superseded Operating Procedure 038.1. (8/1/11). The Agency contends Grievant's work performance was unsatisfactory because he failed to follow Agency Policy No. 038.1 Reporting Serious or Unusual Incidents.²

9. Policy No. 038.1 Reporting Serious or Unusual Incidents, Section IV (E) (1) (j) provides that employees shall report lost or stolen state property by submission of the *Incident Report* by noon on the next working day, presumably the next working day after becoming aware of the incident. (A Exh. 6, p. 6).

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,

² Neither party contended that the policy replaced did not contain a similar provision requiring staff to submit incident reports for lost or stolen property. Accordingly, the Hearing Officer finds a similar provision existed under Operating Procedure 038.1 (8/1/11) and was effective from August 1, 2011, to August 30, 2013, inclusive of a time period relevant to this grievance.

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.³

The Commonwealth of Virginia Department of Corrections Operating Procedure sets forth the Commonwealth's Standards of Conduct and disciplinary process that the Department of Corrections ("DOC") must employ to address unacceptable behavior, conduct, and related employment problems in the workplace.⁴

These standards group offenses in three categories – Group I, Group II, and Group III offenses. The least severe are noted as Group I violations of workplace conduct; Group II offenses are more severe; and Group III offenses are the most severe normally warranting termination for a first offense.⁵ When circumstances warrant it, management may mitigate discipline if in its judgment it is proper to do so.⁶

As stated previously, Agency management issued Grievant a Group I Written Notice. The Hearing Officer examines the evidence to determine if the Agency's discipline was warranted and appropriate under the circumstances.

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 I Written Notice and did that behavior constitute misconduct?

³ Grievance Procedural Manual §5.8

⁴ Virginia Department of Corrections Operating Procedure 135.1 I.

⁵ Virginia Department of Corrections Operating Procedure 135.V.

⁶ *Id.*

The Agency contends that Grievant's work performance was not satisfactory because during the period, December 2012 to January 2013, he failed to submit an incident report notifying his superior of a missing gas card. The evidence is undisputed that during the timeframe Grievant is alleged to have performed unsatisfactory, Grievant did not provide such an incident report to management.

Next, the Hearing Officer examines whether Grievant's failure to submit the report was misconduct.

The evidence shows that management assigned Grievant to the Armory division in November 2012. The responsibilities of staff assigned to the Armory include maintaining an inventory of items in this department that are loaned to employees for usage in the course of their employment. Credit cards for the purchase of gas are included in the aforementioned items that are housed at the Armory and that may be assigned to employees to facilitate their performing work related tasks. The evidence demonstrates that even though Grievant was transferred to the Armory in November 2012, his work in the Armory did not begin until December 2012, as Grievant was in training in another location prior to December 2012.

Moreover, Agency Policy No. 038.1 presented by the Agency, requires employees to submit incident reports by noon on the next working day upon learning of lost or stolen state property.

The undisputed evidence also shows that during September/October 2012, staff in the Armory determined that several gas cards kept in the Armory were missing. Grievant became aware of the missing cards in December 2012, when as mentioned above, he physically reported to that division for work. He was told by his superior, Sergeant 2, of the situation and that an incident report had been submitted. In addition, during that time, the evidence shows that another of Grievant's superiors, the Lieutenant, informed Grievant that the Lieutenant would discuss the missing gas cards with his superior.

Sergeant 1, the Agency's own witness and an employee superior in rank to Grievant, testified that even considering Agency Policy No. 038.1, it was not reasonable to expect Grievant to submit an incident report for the missing/stolen card. This is so according to the Agency's witness because the card was discovered missing from the Armory several months prior to Grievant beginning to work in that division. Sergeant 1 also noted that consistent with the referenced policy, any incident reports should have been made long before Grievant begin working in the Armory. The Hearing Officer finds Sergeant 1's testimony is persuasive, particularly considering the Agency presented Sergeant 1 as its chief witness, he is a sergeant and superior in rank to Grievant, and it is reasonable to assume that Sergeant 1 is knowledgeable of Agency policy and its application.

The Hearing Officer notes that the Agency did present testimony from a second witness, the assistant warden. However, this witness had only been employed by the Agency for four months at the time of the hearing. What is more, he testified with uncertainty and had no specific or personal knowledge of the alleged offense.

Accordingly, considering the above, the Hearing Officer finds the Agency is unable to meet its burden and show that the Grievant's failure to submit an incident report was misconduct.

B. Was the discipline consistent with policy and law?

The discipline is not consistent with policy and law as the Agency is unable to show by a preponderance of the evidence that Grievant's failure to submit an incident report violated Agency policy regarding reporting serious incidents.

II. Mitigation

A discussion regarding mitigating the discipline is not undertaken as the Hearing Officer has found the Group I Written Notice was not warranted and appropriate under the circumstances.

DECISION and ORDER

The Hearing Officer has considered all the evidence of record whether specifically mentioned or not. Having done so, for the reasons noted here, the Agency's issuance to Grievant of a Group I Written Notice is rescinded. The Agency is ordered to rescind the Group I Written Notice.

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., 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 N. 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.⁷

Entered this 14th day of February, 2014.

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Grievant
EDR

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.