

Issue: Group III Written Notice with Termination (failure to follow policy and theft);
Hearing Date: 06/20/14; Decision Issued: 06/23/14; Agency: VDOT; AHO: Cecil
H. Creasey, Jr., Esq.; Case No. 10384; Outcome: No Relief – Agency Upheld.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 10384

Hearing Date: June 20, 2014
Decision Issued: June 23, 2014

PROCEDURAL HISTORY

Grievant was a transportation operator for the Department of Transportation (“the Agency”). On April 22, 2014, the Grievant was charged with a Group III Written Notice for failure to follow policy and theft of state property. The discipline was termination of employment.

Grievant timely filed a grievance to challenge the Agency’s disciplinary action, and the grievance qualified for a hearing. On June 3, 2014, the Office of Employment Dispute Resolution, Department of Human Resource Management, (“EDR”) appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for June 20, 2014, on which date the grievance hearing was held at the Agency’s facility.

Both the Grievant and the Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency’s or Grievant’s Exhibits, respectively. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant
Representative for Agency
Advocate for Agency
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?

Through her grievance filings, the Grievant requested rescission of the Group III Written Notice, reinstatement, and back pay.

BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* 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.

APPLICABLE LAW 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 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).

Code § 2.2-3000 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 the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group III Offenses to include acts of misconduct of such a sever nature that a first occurrence normally should warrant removal. This level is appropriate for offenses that, for example, constitute illegal or unethical conduct; neglect

of duty; or other serious violations of policies, procedures, or laws. Absent mitigating circumstances, a Group III Offense should result in termination. Agency Exh. 9.

VDOT's Disposal of Material policy, AMD No. 1.02, provides for property disposal:

For personal property items found along the right-of-way, appropriate efforts should be made to locate the private owner or such item should be turned over to the local police. Trash and garbage should be taken to a landfill.

All other items found along the right-of-way, state-purchased items, and residue/scrap items are considered VDOT's state-owned materials.

Agency Exh. 7. The directive of the policy states "VDOT employees may not take possession, use, sell or dispose of state-owned materials of any kind for personal gain." (Emphasis in original.)

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy... "the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a transportation operator, with over ten years tenure. The current written notice charged:

On April 14, 2014, while working on a patching operation you were observed taking items from around an abandoned trailer at a rest area off of I-95. While VDOT was investigating the theft of these items you admitted to taking 2 bottles of cider and putting them in a VDOT sign truck. According to VDOT's directive

on the disposal of materials (AMD # 1.02) if personal items are found on the VDOT right-of-way they should be turned over to local police.

Agency Exh 4.

The Agency's witnesses testified consistently with the charge in the Written Notice of the conduct in question. Based on a citizen's report of observing the conduct in question, the Agency investigated and found the occurrence of the Grievant taking abandoned personal property. The Grievant admitted doing so, although the property at issue had negligible value. The Grievant expressed remorse during her testimony. She wrote, on April 21, 2014:

On Monday, the 14th of April I took a few items out of an abandoned trailer that was parked in the rest area at the [] mile marker northbound. I know that I have done wrong, and if I could turn back time I wouldn't have taken anything, but unfortunately that is beyond my powers. I can't fully express into words how sorry I am, but I can tell you that this will not happen again.

I am a good worker and do whatever I am asked to do. My bosses can always count on me when there is an emergency. I do help keep Virginia moving, even in the middle of the night. I am never late for work, and if I can't make it in for whatever reason, I make sure I call [] before the start of work hours. I enjoy working at Vdot, and I hope that the mistakes I've made will not cause me to lose my job.

Agency Exh. 3.

The Grievant received and was aware of the Agency's policy on found property. Agency Exh. 8. The Grievant presented annual performance evaluations recognizing her as a contributor to the Agency. Grievant's Exh. She also testified to her belief that other Agency employees have been guilty of worse offenses and did not lose their jobs.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. The evidence shows that the Grievant took possession of personal property in violation of Agency policy. Theft or unauthorized removal of state records/property is an example of a Group III offense.

Based on the evidence presented, I conclude that the Agency has met its burden of proof of the offense and level of discipline—Group III with the normal discipline of termination.

Mitigation

The agency has proved (i) the employee engaged in the behavior described in the written notice, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* (“Hearing Rules”) § VI.B.1.

Under Virginia Code § 2.2-3005, the hearing officer has the duty to “receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Office of Employment Dispute Resolution.” 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.

For circumstances considered, the Agency stated in the Written Notice, in Section IV:

[Grievant’s] 11 years of service and work performance were considered in the issuance of this discipline. No compelling mitigating information was provided by [the Grievant] during due process. When asked by the Maintenance Supervisor if she took anything off the trailer she said “yes”. She said that she took 2 bottles of non-alcoholic sparkling cider that were next to the trailer and put them in the cab of the sign truck. She stated that she walked the items from the abandoned trailer to the sign truck. When [], Maintenance Supervisor and [], Maintenance Superintendent looked in the sign truck they discovered additional items such as canned cat food, a plastic bucket of cat food, a chicken grilling stand, and a case of Fresca soda. Based on these findings, [Grievant] is hereby being advised that her employment is terminated as outlined under DHRM Policy 1.60 – Standards of Conduct.

The Grievant asserts, reasonably, that mitigating circumstances could have been used to reduce the Group III Written Notice and termination. The Agency had leeway to impose discipline along the continuum less than Group III with termination. The level of discipline in this situation is fairly debatable. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency’s discipline falls within the limits of reasonableness.

On the issue of mitigation, EDR has ruled:

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on that issue for that of agency management. Rather,

mitigation by a hearing officer under the *Rules* requires that he or she, based on the record evidence, make findings of fact that clearly support the conclusion that the agency's discipline, though issued for founded misconduct described in the Written Notice, and though consistent with law and policy, nevertheless meets the *Rules* "exceeds the limits of reasonableness" standard. This is a high standard to meet, and has been described in analogous Merit System Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.

EDR Ruling #2010-2483 (March 2, 2010) (citations omitted). EDR has further explained:

When an agency's decision on mitigation is fairly debatable, it is, by definition, within the bounds of reason, and thus not subject to reversal by the hearing officer. A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"

EDR Ruling 2010-2465 (March 4, 2010) (citations omitted).

As with all mitigating factors, the grievant has the burden to raise and establish any mitigating factors. *See e.g.*, EDR Rulings 2010-2473; 2010-2368; 2009-2157, 2009-2174. *See also Bigham v. Dept. Of Veterans Affairs*, No. AT-0752-09-0671-I-1, 2009 MSPB LEXIS 5986, at *18 (Sept. 14, 2009) citing to *Kissner v. Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986). (Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the employee).

While the Grievant raised the issue of disparate treatment, there is nothing to show that the Agency's handling of this discipline was in any way disparate treatment beyond the Grievant's mere allegation. Grievant has not presented sufficient evidence to show that the Agency's discipline was applied inconsistently. Rather, it appears that the determinations were based on the Grievant's actual conduct, all of which actions were within the Grievant's control. She admitted the conduct and expressed remorse, and that could have been taken into account by Agency management for leniency. While lesser discipline was within the discretion of Agency management, the Agency acted within its discretion by issuing a Group III Written Notice with termination.

There is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that the chosen discipline was its only option. While the Agency could have justified or exercised lesser discipline, I find no mitigating circumstances that render the Agency's action of a Group III Written Notice with termination outside the bounds of reasonableness. Accordingly, I find no mitigating circumstances that allow the hearing officer to reduce the Agency's action.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, 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, even if he disagrees with the action. Even if the hearing officer would have levied a lesser discipline, the Agency has the management prerogative to act within a continuum of discipline as long as the Agency acts within the bounds of reasonableness. In this case, the Agency's action of imposing a Group III Written Notice is within the limits of reasonableness. The Hearing Officer, thus, lacks authority to reduce or rescind the disciplinary action.

DECISION

For the reasons stated herein, without the authority to reverse the Agency's action, I must uphold the Agency's Group III discipline with termination.

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.¹

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

A handwritten signature in blue ink, appearing to read "Cecil H. Creasey, Jr.", written over a horizontal line.

Cecil H. Creasey, Jr.
Hearing Officer

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