

Issue: Group III Written Notice with Termination (failure to follow instructions, leaving work without permission, unauthorized removal of State property); Hearing Date: 08/05/13; Decision Issued: 08/06/13; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No.10133; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 08/21/13; EDR Ruling No. 2014-3701 issued 09/20/13; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 08/21/13; DHRM Ruling issued 09/24/13; Outcome: Declined to review.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10133

Hearing Date: August 5, 2013

Decision Issued: August 6, 2013

PROCEDURAL HISTORY

On May 24, 2013, Grievant was issued a Group III Written Notice of disciplinary action with removal for failure to follow supervisor's instructions, leaving worksite without permission, unauthorized use of state property, theft of State property, and negligence in regard to the Agency's duties to the public.

On June 19, 2013, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On July 9, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 5, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency's 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. 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 employed Grievant as a Transportation Operator II at one of its facilities. He had been employed by the Agency for 26 years prior to his removal effective May 24, 2013.

When the Agency performs roadside maintenance or construction, it sometimes needs to remove dirt and debris from the construction site and move it temporarily to its Facilities. The Agency then transports the dirt from its facilities to approved dump sites for reclamation or disposal. The Agency enters into agreements with property owners to dump dirt on their property only after considering the environmental impact of doing so. The Agency sometimes enters into contracts with vendors it trusts to properly dispose of and reclaim the dirt and debris.

On September 10, 2009, Grievant entered into a Property Owner Agreement Maintenance Disposal Site with the Agency granting the Agency authority to dispose of material which consisted of topsoil, direct, and gravel from a VDOT maintenance project. Approximately 50 or 60 truckloads of dirt were dumped on his property. The Agreement did not have an expiration date. The Agency believed its authorization under the Agreement ended after Grievant dumped dirt in 2009. Grievant did not believe the Agreement had an expiration date and that his property continued to be an adequate dump site.

On May 17, 2013, the Supervisor instructed Grievant to take dirt from the Facility to the Pit. The Agency had an agreement with the Pit for the Pit to receive dirt from the Agency's Facility because of the Pit's ability to reclaim and dispose of the dirt properly. Grievant's property was located between the Facility and the Pit. Grievant loaded dirt from the Facility into the Agency's dump truck and drove it in the direction of the Pit. He took a short detour to his home and dumped the dirt on his property. His dump truck became stuck in a soft part of his property. Grievant called another employee to come pull out the dump truck. Once the dump truck was pulled out, Grievant went to the Facility and obtained a second load of dirt and took it to his property and dumped the dirt on his property.

The Manager valued the dirt at approximately \$200 based what it would cost to have dirt delivered to a homeowner. He testified that if Grievant had asked permission to dump the dirt on his property, the Agency likely would have denied the request because the Agency had a business need to deliver dirt to the Pit. The Pit was authorized for mine and mineral reclamation.

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."¹ 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."

Failure to follow a supervisor's instructions is a Group II offense. Leaving the work without permission is a Group II offense. Unauthorized use or misuse of State property is a Group II offense. "Theft or unauthorized removal of State records/property"² is a Group III offense.

VDOT Policy 1.02 governs Disposal of Materials. This policy provides, "VDOT employee may not take possession, use, sell, or dispose of state-owned materials of any kind for personal gain." The policy defines "Residue materials" as:

Any materials left over from a State project or work by Department employees. Such materials include, but are not limited to, excess asphalt or bituminous materials from resurfacing or pothole work, scrap pieces of wood from carpenter shops, cans of used paint from paint shops, timber

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

² See, Attachment A, DHRM Policy 1.60.

from bridge decks, dirt spoils from ditching operations, cut tree trunks, limbs and other wood debris from tree trimming operations.

On May 17, 2013, the Supervisor instructed Grievant to take dirt from the VDOT Facility to the Pit for disposal/reclamation. Grievant failed to comply with that instruction because he took dirt from the VDOT Facility to his home. Grievant left work because he deviated from the path he was expected to travel from the VDOT Facility to the Pit. Grievant was not authorized to use the dump truck for the purpose of dumping dirt on his own property. Grievant's use of the dump truck was unauthorized on May 17, 2013.

The Agency argued that Grievant stole dirt from VDOT. Grievant argued that he did not steal the dirt because he believed it was valueless waste. It is not necessary for the Agency to establish that Grievant had the intent to steal. The dirt was VDOT property once it was placed on the VDOT Facility. Grievant knew he had to have the Agency's authority to remove the dirt because in 2009 he followed the appropriate procedure to obtain the Agency's permission to remove the dirt. On May 17, 2013, Grievant knowingly took Agency property without first obtaining permission to do so. His removal of the Agency's property was unauthorized. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice for unauthorized removal of State property.

Grievant argued that the level of discipline was excessive compared to the offense. The Agency disciplined Grievant in accordance with the Standards of Conduct. The level of discipline was not excessive when measured by the provisions of the Standards of Conduct.

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"³ 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 his 26 years of experience should serve as a mitigating circumstance. An employee's length of service and otherwise satisfactory work performance is rarely a basis to mitigate disciplinary action. Grievant has not

³ *Va. Code § 2.2-3005.*

established a basis to mitigate the disciplinary action based on his length of service or work performance.

Grievant argued that the Agency inconsistently applied disciplinary action. Grievant presented evidence from another employee in another location who received a Group I Written Notice regarding dumping dirt at the Facility yard. The employee was told to take the dirt to the Facility yard and dump it there. Many other trucks were attempting to dump dirt at the Facility yard which caused a delay. The other employee elected to dump the dirt in another authorized dump site in order to speed up the process and to be more efficient in carrying out his duties. Grievant and the other employee were not similarly situated. Grievant moved dirt for his own benefit. The other employee dumped dirt in a different location and with the objective of helping the Agency. The other employee did not dump dirt for his own benefit.

In light of the standard set forth in the Rules, 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 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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.