

Issue: Group II Written Notice with Suspension (unauthorized use of State property);  
Hearing Date: 09/17/12; Decision Issued: 09/19/12; Agency: UVA; AHO: Cecil H.  
Creasey, Jr.; Outcome: No Relief – Agency Upheld.

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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Case No. 9875

Hearing Date: September 17, 2012  
Decision Issued: September 19, 2012

PROCEDURAL HISTORY

Grievant, a vehicle services person with the University of Virginia (“Agency”) was issued a Group II Written Notice with 10 days suspension, issued May 22, 2012. Agency Exh. 1. The discipline was issued under the authority of the Department of Human Resource Management’s Policy 1.60, *Standards of Conduct*. Agency Exh. 6. Grievant timely filed a grievance to challenge the Agency’s action. The outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On August 20, 2012, the Office of Employment Dispute Resolution (“EDR”) appointed the Hearing Officer. At the pre-hearing conference, the hearing was scheduled at the first date available between the parties and the hearing officer, September 17, 2012, at which time the grievance hearing was held at the Agency’s offices.

The Agency submitted exhibits that were, without objection, admitted into the grievance record, and they will be referred to as Agency’s Exhibits, numbered respectively. The Grievant relied on the same documentation and, thus, did not submit a separate document package. The hearing officer has carefully considered all evidence presented.

Other active disciplinary Written Notices, a Group I and a Group II, are included in the grievance record, as the Agency relied on the progressive disciplinary process. Agency Exhs. 2 and 3.

APPEARANCES

Grievant  
Advocate and Representative for Agency  
Witnesses

## ISSUES

1. Whether Grievant engaged in the behavior described in the termination memorandum?
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 under applicable policy)?
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?

The Grievant requests rescission of the termination and job reinstatement.

## 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 II offenses to include acts of misconduct of a more serious [than a Group I offense] and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that have a significant impact on business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws. An example of a Group II offense is unauthorized use or misuse of state property.

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 operable facts are not materially in dispute and are summarized effectively in the Agency's Written Notice:

Two instances of the unauthorized use or misuse of state property. On 3/29/2012 video showed [the Grievant] driving his personal vehicle into the Mechanics' Work Bay. [The Grievant] entered a secured, inventory controlled, Parts Room from which he retrieved a can of "tire black" (part #MT15) and shop rags (white wiping cloths). [The Grievant] then used these items to detail his personal vehicle during his regularly scheduled work shift.

On 4/4/2012 video again showed [the Grievant] driving his personal vehicle into the Mechanic's Work Bay. [The Grievant] entered the Parts Room from which he retrieved shop rags. [The Grievant] stated in the Predetermination meeting that these rags were used to clean a stain in the rear passenger seat of his personal vehicle.

Personal vehicles are not permitted within the Mechanics' Work Bay. [The Grievant] misused state property by bringing his personal vehicle into an area reserved for University vehicles and using University supplies for his personal reasons.

During the Predetermination meeting held on 5/15/2012, [the Grievant] stated that he had cleaned his vehicle in the Mechanics' Work Bay a few times before. He also noted that he probably shouldn't pull his personal vehicle into the Mechanics' Work Bay but did so because it is well lit.

A second Predetermination meeting was held on 5/18/2012. [The Grievant] brought no new information forward.

The Grievant's supervisor testified that the shop manager noticed tire black residue on the floor of the mechanics' bay. Upon inquiry, the Agency's security camera video showed the Grievant's conduct described in the Written Notice. The supervisor consulted the human resources department and concluded that the Group II offense of unauthorized use of state property was the proper offense. Although human resources recommended 30 days suspension, the supervisor testified that he believed 30 days suspension was too severe and opted for the 10 days suspension. Because the Grievant had no direct supervision during his night shift, there was no direct basis to conclude that there was abuse of state time.

The supervisor testified that he had disciplined no other employees for this offense during his supervising tenure of less than one year, but he was aware of no other such instances. The supervisor testified that the conduct of entering the controlled parts room and using the state property in this way was a breach of trust, regardless of the value of the products consumed.

The Grievant does not dispute the facts as asserted in the Written Notice. However, he asserts that the discipline levied against him is disparate treatment. The Grievant testified to his belief that other employees have done what he has done without any consequences. The Grievant, however, did not present any specific instances known to supervision. The Grievant's supervisor testified that he would enforce the unauthorized use of state property consistently, depending on the involved employee's specific circumstances.

The Grievant brought to the Agency's attention information, by way of a photograph, of an Agency employee apparently using the Agency's facility for personal reasons. The Grievant's supervisor testified that the employee involved was not under his supervision, but he referred the matter to the appropriate supervisor for disciplinary inquiry.

The Grievant acknowledged that his conduct was against Agency policy, and that he was unaware of the security cameras. The Grievant also asserted that there were no signs posted announcing prohibited conduct, and that he was not on notice of enforcement. The Grievant's witnesses, two bus drivers, were called to testify to the practice of disparate discipline, but they were unable to establish disparate disciplinary treatment. Two other witnesses identified by the Grievant could not attend the hearing, but the Grievant asserted they would not present any additional information. The Grievant testified that he had witnessed many instances of other

employees using Agency resources. However, while the Grievant believes the other instances were not disciplined, he could not identify any specifics of disparate discipline. The Grievant also asserts his belief that the discipline was levied for an improper purpose, namely his successful efforts in reducing the discipline for a previous Written Notice. While the Grievant's belief may be sincere, I find that 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.

Based on the evidence presented, the Agency met its burden of proving the misconduct and the accompanying level of discipline.

### Mitigation

The Agency considered the issue of mitigation in reaching its decision not to terminate the employment of the Grievant. On the Written Notice, the Agency stated:

[The Grievant] has an active Group I, dated 2/16/2011, and an active Group II, dated 12/21/2011. Two Group II's normally result in termination, or a 30 day suspension. This discipline has been mitigated to a 10 day suspension. [The Grievant's] attendance record and truthfulness during the Predetermination Meeting were taken into consideration. Any further violations of the Standards of Conduct by [the Grievant] before 12/21/2014 may result in termination of employment.

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. 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.

Termination is the normal disciplinary action for two Group II Written Notices unless mitigation weighs in favor of a reduction of discipline. 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 Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). 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.

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. In this case, the Agency's action of imposing discipline of a Group II with 10 days suspension is within the limits of reasonableness. As explained above, the Hearing Officer finds no basis that permits any mitigation to reduce or rescind the disciplinary action.

### DECISION

For the reasons stated herein, the Agency's Group II Written Notice with 10 days suspension 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 14<sup>th</sup> 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 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 14<sup>th</sup> 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>1</sup>

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

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