

Issue: Group III Written Notice with Termination (theft of State property);  
Hearing Date: 04/20/15; Decision Issued: 05/20/15; Agency: DGIF; AHO:  
Sondra K. Alan, Esq.; Case No. 10552; Outcome: Full Relief;  
**Administrative Review**: EDR Ruling Request received 06/04/15; EDR  
Ruling No. 2015-4165 issued 07/29/15; Outcome: Remanded to AHO to  
reopen hearing; Reopened Hearing held 09/11/15; Remand Decision  
issued 10/06/15; Outcome: Original decision reversed – No Relief –  
Agency Upheld; **Administrative Review**: EDR Ruling Request on 10/06/15  
Remand Decision received 10/19/15; EDR Ruling No. 2016-4254 issued  
11/18/15; Outcome: AHO's remand decision affirmed; **Administrative  
Review**: DHRM Ruling Request on original decision received 06/04/15;  
DHRM Ruling issued 12/04/15; Outcome: AHO's decision affirmed;  
Judicial Review: Appealed to Circuit Court in Smyth County (12/18/15);  
Outcome: AHO's decision found not contradictory to law (04/21/16) [CL15-  
935].

DECISION OF HEARING OFFICER  
IN RE: CASE NO. 10552  
HEARING DATE: April 20, 2015  
DECISION ISSUED: May 20, 2015

PROCEDURAL HISTORY

On December 29, 2014 Grievant was issued a Group III Written Notice of disciplinary action with removal from employment based on a theft offense which occurred in "September 2014". The discipline was based on four Offense Codes: #51, Unauthorized use of State property or records; #72, Theft; #77, Damaging State property or records; #78, Interference with State operations. Verbally, Grievant was charged with "unauthorized removal or theft of State property (ECM circuit breaker for GMC TopKick Dump Truck). Damaging State property (removed critical component of a vehicle to prevent useful operations). Interference with State operations (caused Agency to spend considerable work time and funds to transport, diagnosis and repair a vehicle)."<sup>1</sup> On February 15, 2015 the Department of Employment Dispute Resolution assigned the matter to a Hearing Officer. During two phone conferences on February 19, 2015 and March 18, 2015 motions were heard and considered. The matter was set for hearing on April 20, 2015.

APPEARANCES

Agency Attorney  
Agency representative as witness  
Grievant attorney  
Grievant as witness

ISSUES

- 1) Did Grievant use state property in an unauthorized manner?
- 2) Did Grievant commit theft?
- 3) Did Grievant purposefully remove any integral part of the state owned vehicle?
- 4) Did Grievant intend to disable a state owned vehicle and interfere with state operations?

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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 is to be proved is more probable than not. GPM § 9. Grievant has the burden of proving any affirmative defenses raised by Grievant GPM §5.8.

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<sup>1</sup> Agency Exhibit 8

## APPLICABLE LAW and POLICY

The Agency relies on its Offense Codes as previously stated.

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." 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."<sup>2</sup>

## FINDING OF FACTS

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

The Department of Game and Inland Fisheries owned a 2002 GMC Dump Truck. The vehicle had low mileage but several times stalled while in use causing down time to employees. The vehicle was taken to a repair shop where it stayed for about eight months from January 2014 to August 2014. The garage returned the vehicle but stated they were not confident the problem had been fixed. Grievant asked management on several occasions if the Agency planned on selling the vehicle and/or what was found to be wrong with it.

After the vehicle returned from the garage it appeared to have a different problem. It would not start or would start and not turn over. It appeared this problem was experienced from at least September 11, 2014 to October 8, 2014 when it was taken to a different garage. A few days after the vehicle arrived at the new garage the mechanic called the Agency to say an ECM circuit break (relay) had been removed from the truck's panel. The mechanic stated the vehicle could never start without this piece of equipment. The garage also repaired problems of air in the fuel system and replaced a faulty transfer pump as well as replacing the relay.

It was obvious some person removed or stole the relay. Since Grievant had on several occasions asked about the future of the vehicle the Agency theorized it was Grievant who had removed the part. They furthered believed that the person who had removed it would check to see if it had been replaced once the truck was back in the Agency's possession.

A surveillance camera was set up in the truck where it had been delivered to the Department's Marion Station. The camera was not set up when the truck was returned but was later set up the day before Grievant returned from his vacation. Grievant was captured on the camera opening the truck door and accessing the relay panel.<sup>3</sup> This led

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<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees

<sup>3</sup> Agency collective Exhibit 3

Agency to conclude Grievant was the culprit who had earlier removed the relay. Grievant was given a Group III written notice with termination and was also criminally charged.

Evidence was presented at hearing that Grievant had been found guilty of Virginia Code § 18.2-146 and ordered to pay restitution.<sup>4</sup> No further comment was made by either side about the General District Court ruling. Grievant entered a plea of *nolo contendere*. No evidence was presented as to whether or not the matter was a plea bargain, what evidence was presented, whether or not Grievant testified or whether or not the matter is on Appeal. Two other charges, theft and intentional damage, related to the incident were Ordered *nulle prosequi* on Prosecution's motion.

Grievant's testimony was that when he returned to work from his vacation he found keys to several vehicles had not been placed in the office as they should have been. He called his supervisor regarding this matter. Grievant was told to check all vehicles. Grievant stated when he checked the 2002 GMC he found the relay panel cover not properly shut and proceeded to remove and realign it to close it. Grievant absolutely denied having ever taken the relay from the vehicle.

Grievant had been an employee of the department for more than twenty years. Grievant did have previous minor discipline issues<sup>5</sup> and had difficulty in cooperating with at least one other employee.<sup>6</sup> Grievant presented seven written character statements with no objection from the Agency.<sup>7</sup> The character statements included the Commonwealth's Attorney of Grayson County and the Sheriff of Washington County. All statements conveyed the belief it was very unlikely that Grievant committed the acts of which he was accused.

Grievant's counsel further question Agency's witness as to policy related to auction of state property. It was confirmed that state employees could not bid higher than \$500.00 for an item. The 2002 GMC, even in a disabled condition, would have been expected to sell for more than ten times what Grievant would have been able to bid.

### OPINION

Only two witnesses testified, one for the Agency and Grievant himself. No opening or closing statements were made by counsel. The Agency witness and Grievant had completely different opinions as to Grievant's guilt. There were no further witnesses to balance who was telling the truth and both explanations were plausible. There was no direct evidence of who removed the relay panel or when it was removed. The Agency had a theory as to who stole the relay and felt their theory was proven.

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<sup>4</sup> Agency Exhibit 9

<sup>5</sup> Agency Exhibit 5 and 6

<sup>6</sup> Agency Exhibit 6

<sup>7</sup> Grievant collective Exhibit 1

However, I find Agency's theory on which they base their case to be quite faulty. Anyone who purposely removed the relay to disable the vehicle would have known enough about the mechanics of the vehicle to know it would never start without the relay. Therefore, when the vehicle was returned after repair that person would certainly know it had been replaced with no need to "check" to see if it was there. No other person than Grievant was suspected by the Agency. Any person, employee or otherwise, could have stolen this part. It could have been removed for his or her own use, for resale, or to try to implicate Grievant as a suspected thief. It could have been taken while at the garage by a mechanic or any other person while in the garage lot. There were other repairs that were made to the vehicle that had contributed to the truck's failure to start. There was no evidence the relay was removed before it left the Agency's control to be taken to the garage.

Grievant's inquire about the sale of the vehicle could have never benefited Grievant as, by state policy, no employee could bid more than \$500.00 on state property at auction. Even disabled and of no use to the state, the vehicle would have been worth more than ten times Grievant's buying power.

Therefore, the weight of the evidence does not prove Grievant's handling of the relay panel after the truck had been repaired led to the conclusion that he was the one who stole it prior to repair.

A hearing officer must give deference to an Agency's conclusion unless clearly wrong. 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.<sup>8</sup> In this instance, I believe Agency's theory that Grievant was guilty of removing the relay because he several times asked if the vehicle would be sold or what mechanical problems the vehicle had, and was later observed opening the relay panel is not sufficient evidence to conclude that at some point in the past he was the thief. The preponderance of the evidence does not favor Agency's conclusion.

### 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 **Rescinded**. The Agency is ordered to reinstate Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with back pay less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. Attorney's fees were not requested and will not be rewarded.

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<sup>8</sup> Grievance Procedure Manual (GPM) § 5.8

## 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>9</sup>

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<sup>9</sup> 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.

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

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Sondra K. Alan, Hearing Officer

RECONSIDERATION OF DECISION OF HEARING OFFICER  
IN RE: CASE NO. 10552  
HEARING DATE: April 20, 2015  
DECISION ISSUED: May 20, 2015  
RECONSIDERATION REQUEST RECEIVED: July 27, 2015  
RESPONSE TO RECONSIDERATION: October 6, 2015

APPLICABLE LAW and POLICY

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.<sup>10</sup>

HISTORY

On December 29, 2014 Agency issued a Group III Written Notice of disciplinary action for failure of Grievant to comply with Offense Codes 51, 72, 77 and 78 which related to the alleged offense of Grievant purposefully disabling a company truck by removing an integral part. Grievant was arrested for these charges and by Alford Plea in the General District Court of [] County was found guilty of injuring or tampering with the state vehicle.<sup>11</sup> Grievant was ordered to pay restitution and not go upon Agency's property.

When the matter was heard by the Hearing Officer she did not believe the Agency had sufficient proof to show that Grievant had, in fact, committed the matters for which he was charged.<sup>12</sup>

The Agency filed a timely Appeal to the Employment Dispute Resolution for review stating the Hearing Officer had overstepped her authority by substituting her opinion over the Agency's determination. An Appeal was also made to DHMR that has not yet been heard.

The Employment Dispute Resolution director issued an administrative review and found the following:<sup>13</sup>

Part of the record of the hearing was incomplete. Grievant's testimony was not recorded. The director offered solutions to this issue which ultimately was

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<sup>10</sup> § 7.2 Department of Employment Dispute Resolution (EDR) Grievance Procedure Manual.

<sup>11</sup> Agency exhibit tab 6

<sup>12</sup> Hearing Officer decision case# 10552 May 20, 2015

<sup>13</sup> Ruling # 2015 – 4165 July 23, 2015



resolved by both parties stipulating to giving written accounts of the testimony proffered at the original hearing.

Further, the Hearing Officer's opinion was to be "consistent with law and policy". The General District Court had ordered that Grievant not be upon the Agency's property so that restitution to Grievant's previous job would be impossible.

A rehearing was scheduled for September 11, 2015 at which time both sides advised the Hearing Officer there would be no restatement of previous testimony other than by affidavit of facts presented at the hearing. Agency did present new evidence of Grievant having previously purchasing state property in value excess of \$500.00. Grievant gave brief oral testimony regarding his purchase of the state property as well as Grievant's testimony that he had requested review of the [] County General District court decision hoping to rescind the requirement that Grievant not enter Agency's property.

### OPINION

In reviewing the evidence along with new evidence it is again difficult to determine, based on the weight of the evidence, which party should prevail in the issue of whether or not Grievant had committed the act for which he was terminated. While the Hearing Officer cannot simply supplement her opinion as to the severity of Grievant's discipline, the Hearing Officer can certainly find the underlying reason for the discipline to not support the disciplinary action.

Again, this matter is difficult to determine based on the weight of the evidence as both sides simply produced opposing evidence.

The facts favorable to the Agency's case are:

1. Grievant had lied in the past when confronted with evidence of wrong doing.<sup>14</sup>
2. Grievant initially denied his actions to the State Police in regards to opening a circuit box.<sup>15</sup>
3. In checking the vehicles for keys all the vehicles except the vehicle in question were checked on a Saturday.
4. Grievant checked the vehicle in question as the only vehicle checked on the next day, Sunday.<sup>16</sup>
5. In the video Grievant was never shown "looking for the keys".<sup>17</sup>
6. Grievant had in the past purchased a State vehicle for more than \$500.00.<sup>18</sup>
7. Grievant entered into an Alford Plea in regards to tampering with this vehicle and was found guilty of such by the [] County General District Court.<sup>19</sup>

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<sup>14</sup> Agency Tab 1 Written Notice

<sup>15</sup> DGIF stipulation #11

<sup>16</sup> Grievant's testimony

<sup>17</sup> Agency Tab 3

<sup>18</sup> Agency Tab 4

<sup>19</sup> Agency Tab 6

Facts in favor of Grievant are:

1. Repairs were made to the fuel system of the vehicle which could have attributed to its inability to start before being taken to the garage.<sup>20</sup>
2. The circuit panel could have been in the truck when it left for repair.
3. There is no evidence that points to a specific time that Grievant may have had the opportunity to remove the circuit panel from the truck before its repair or when Grievant would have had exclusive access to the truck.
4. Removing a control panel from a vehicle for the purpose of disabling the vehicle is only one of several reasons why a panel might be removed. A person could have taken it for resale, could have taken it for their own use or could have removed the panel for the purpose of “framing” Grievant
5. Grievant categorically states under oath that he has not tampered with the vehicle.

Based on the evidence above and after due consideration I find that Grievant was aware that he could purchase state property such as the truck for over \$500.00. Grievant had purchased a state vehicle for more than \$500.00 in the past and, while he may not have known it was a state vehicle at the time, certainly ascertained who the owner of the vehicle was after its purchase. Yet, Grievant lead the Hearing Officer to believe he could never have purchased the vehicle in question as it would have sold for a value much greater than \$500.00. Grievant’s failure to remember he had removed the circuit panel from the vehicle in question until he saw the video of himself removing the panel raises questions of his veracity. Further, Grievant’s stated reason for being in the truck was to ascertain if the keys had been left in the truck. Yet, the video shows no indication he was looking for keys but rather his attention was solely orientated to the breaker panel.

### DECISION

For the reasons stated above it appears more likely Grievant did, in fact, tamper with State property. The severity of the Agency’s disciplinary action was never an issue with the Hearing Officer. It was the underlined issue of guilt that caused the rescinding of the Group III action. Therefore, upon review, the issuance to the Grievant of a Group III Written Notice with termination is **Upheld**.

### APPEAL RIGHTS

Both parties will have the opportunity to request an administrative review of the hearing officer’s reconsidered decision on any other new matter addressed in the remanded decision (i.e., any matters not previously part of the original decision).<sup>21</sup> Any

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<sup>20</sup> Agency Tab 5 narrative

<sup>21</sup> See, e.g., EDR Ruling Nos. 2008-2055, 2008-2056

such requests must be received by the administrative reviewer within 15 calendar days of the date of the issuance of the remand decision.<sup>22</sup>

Pursuant to Section 7.2(d) of the Grievance Procedure Manual, the Hearing Officer's original Decision becomes a final Decision once all timely requests for administrative review have been decided, and if ordered by an administrative reviewer, the Hearing Officer has issued his remanded Decision.

#### JUDICIAL REVIEW OF FINAL HEARING DECISION

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose.<sup>23</sup> Any such appeal must be based on the assertion that the final hearing Decision is contradictory to law.<sup>24</sup>

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Sondra K. Alan, Hearing Officer

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<sup>22</sup> See Grievance Procedure Manual Section 7.2.

<sup>23</sup> An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts *Virginia Department of State Police v. Barton*, 39 Va App. 439, 573 S.E. 2d 319 (2002).

<sup>24</sup> *Id.*; see also *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573, S.E.2d 319, 322 (2002).