

Issue: Group III Written Notice with Termination (unauthorized use of State property); Hearing Date: 12/15/15; Decision Issued: 12/22/15; Agency: DVS; AHO: John V. Robinson, Esq.; Case No. 10724; Outcome: No Relief - Agency Upheld.

**COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution**

DIVISION OF HEARINGS

In the matter of: Case No. 10724

Hearing Officer Appointment: November 19, 2015

Hearing Date: December 15, 2015

Decision Issued: December 22, 2015

PROCEDURAL HISTORY AND ISSUES

The Grievant requested an administrative due process hearing to challenge the issuance of a Group III Written Notice issued October 14, 2015 by the Department of Veterans Services (the "Department" or the "Agency"), as described in the Grievance Form A dated October 26, 2015.

The Grievant is seeking the relief requested in his Grievance Form A, namely removal of the Group III and the reinstatement. The hearing officer issued a Scheduling Order entered on November 24, 2015, which is incorporated herein by this reference.

In this proceeding the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances. Of course, the Grievant bears the burden of proof concerning any affirmative defenses.

At the hearing, the Grievant was represented by his advocate and the Agency was represented by its advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the Agency into evidence at the hearing.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. During the time relevant to this proceeding (the "Period"), the Grievant was employed by the Agency as a Trades Technician II at a particular cemetery. The Grievant has been with the Agency for over 9 years.
2. On October 10, 2015, an employee of another state agency ("O"), who knows the Grounds Manager of the cemetery, was driving by the cemetery when he saw an orange Kubota tractor being loaded onto a trailer pulled by a truck to be taken off the State property.
3. O sent a text to the Grounds Manager who promptly informed O to call the police because the Agency was not loaning the tractor to another site or to any other state agency for state business as sometimes happens.
4. Ultimately, the Grounds Manager established that the Grievant was the person removing the tractor without permission, for personal reasons to assist a friend pull a modular home and truck that was stuck.
5. The tractor was purchased for approximately \$39,000 two years ago and is worth approximately \$29,000 now. The tractor is not loaned out for personal use.
6. The Grievant is a team leader at the cemetery who sets an example for those under his supervision and who occupies a position of trust with access to all buildings at the cemetery.
7. The Grievant admitted at the time of the incident and admits that he took the tractor without permission.
8. The Department issued a Group III Written Notice and terminated the Grievant's employment effective October 14, 2015.
9. The testimony of the witnesses called by the Agency was both credible and consistent on the material issues before the hearing officer. The demeanor of such Agency witnesses at the hearing was candid and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

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).

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 the 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 (the "SOC"). AE 9. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

The Grievant's disciplinary infractions were reasonably classified by management as a Group III offense. The Grievant argues that the Agency has misapplied policy and acted unjustly. However, the hearing officer agrees with the Agency's advocate that the offense could appropriately have been classified at the Group III level.

While the hearing officer finds that the Grievant did intend to return the tractor and accordingly, that no theft was involved, Attachment A to the SOC gives as one of the specific examples of a Group III offense ". . . unauthorized removal of state records/property . . ." A valuable Kabuto tractor would certainly fit the bill. The valuable tractor could have been damaged or could have caused damage and it is understandable that the Commonwealth did not want it used for personal reasons.

The Grievant as a supervisor of employees breached the trust placed in him by the Department and the Grounds Manager testified that the newer tractor which the Grievant removed performed specialized functions and the Department never knew when it would be needed, thus adversely impacting Agency operations. The tractor was returned to the cemetery before the Grievant had the opportunity to unload it and use it for his personal reasons.

The Grievant established that the Director of Cemeteries who issued the Written Notice, discussed the termination with a former Department employee by phone. However, neither the SOC, nor any other applicable policy makes this a defense to the discipline or otherwise renders the discipline imposed invalid.

The Agency has met its evidentiary burden of proving upon a preponderance of the evidence that the Grievant violated Policy No. 1.60 and that the violations rose to the level of a Group III terminable offense.

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 Grievant asserts that the discipline is too harsh. The Agency did not consider mitigating factors.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." 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. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department did not consider mitigating factors in disciplining the Grievant.

The Grievant has specifically raised mitigation as an issue in the hearing. While the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein, in the Form A and all of those listed below in his analysis:

1. the Grievant's past good service to the Agency in excess of 9 years;
2. the many demands of the Grievant's job;
3. the Grievant's admission that he did not have permission to remove the tractor;
4. the fact that the tractor was undamaged;
5. the fact that the Grievant's overall rating in each of his previous performance evaluations was "Contributor";
6. the fact that the Grievant has had no previous Written Notices issued to him; and
7. the Grievant's parental situation.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious, and of course, there were also aggravating factors in play including the recent warnings to the Grievant by the Grounds Manager concerning the Grievant's personal use of a weed eater. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

Pursuant to SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management.

In this proceeding, the Agency's actions were consistent with law and policy. The Agency appropriately determined that the Grievant's violations of Agency policies warranted a Group III Written Notice and termination under the circumstances. Accordingly, the exercise of

such professional judgment and expertise warrants appropriate deference from the hearing officer.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The hearing officer decides for the offenses specified in the written notice other than theft (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

APPEAL RIGHTS

As the *Grievance Procedure Manual* sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to two types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.
2. **A challenge that the hearing decision does not comply with grievance procedure** as well as a request to present newly discovered evidence is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219, faxed or e-mailed to EDR.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days.) A copy of each appeal must be provided to the other party.

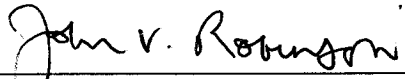
A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised 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. The agency shall request and receive prior approval of EDR before filing a notice of appeal.

ENTER: 12/22/2015



John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail and/or facsimile transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).