



# **COMMONWEALTH OF VIRGINIA**

*Department Of Human Resource Management*

*Office of Employment Dispute Resolution*

## **DECISION OF HEARING OFFICER**

In re:

**Case number: 12021**

**Hearing Date: November 28, 2023**

**Decision Issued: January 22, 2024**

### **PROCEDURAL HISTORY**

On September 21, 2023, Grievant was issued a Group III Written Notice of disciplinary action with termination for unsatisfactory performance, failure to follow instructions and/or policy, unauthorized use or misuse of State property, and theft.

On September 22, 2023, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On October 10, 2023, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On November 28, 2023, a hearing was held at an Agency facility in Warrenton, Virginia.

### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency's Counsel  
Agency Party Designee  
Witnesses

### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Group III Written Notice of disciplinary action?
2. Whether the behavior constituted misconduct?

*An Equal Opportunity Employer*

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. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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:

Prior to his dismissal, Grievant was a Transportation Operator II with the Department of Transportation at one of its facilities. Grievant had been employed by the Agency for more than 30 years. Grievant's performance evaluations from 2019, 2020 and 2022 indicate Grievant's work was considered satisfactory and met the Agency's expectations.<sup>1</sup> No evidence of prior active disciplinary action was introduced during the hearing.

On September 12, 2023, Grievant was working for the Agency at a Ditching Project. One of the tasks assigned to Grievant was to haul material, including soil, in an Agency Dump Truck to an Agency-owned Site that was used as a "dump site."

At some point on the afternoon of September 12, 2023, during Grievant's work hours, Grievant drove an Agency Dump Truck hauling Agency soil to Grievant's property rather than to the Agency-owned Site. Grievant dumped the soil in the Agency Dump Truck onto his property.

On September 12, 2023, an Agency employee reported to an Agency manager that he had observed Grievant driving an Agency Dump Truck on a Road in the County.<sup>2</sup> Grievant had no business reason to be in that area.

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<sup>1</sup> Grievant's Ex. A.

<sup>2</sup> Hearing recording at 12:17-14:56.

Superintendent met with Grievant to inquire about the sighting of Grievant in the Agency Dump Truck on the Road in the County.<sup>3</sup> Grievant admitted to Superintendent that he had hauled soil from the Ditching Project to a property owned by Grievant. Grievant admitted to Superintendent that he had dumped the load of soil onto his property to use for his pig lot.<sup>4</sup>

### **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."<sup>5</sup> 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."

#### Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

On September 12, 2023, during Grievant's work hours, Grievant took the Agency's Dump Truck containing soil belonging to the Agency and dumped the soil onto Grievant's property. Grievant was authorized to use the Agency's Dump Truck for business purposes only. Grievant was not authorized to use the Agency's Dump Truck to haul soil to Grievant's private property. Grievant did not have permission to take the Agency's soil to use for his private purposes.

Grievant did not dispute that he was not authorized to use the Agency's Dump Truck to haul material to his private property. Grievant did not dispute that he did not have permission from the Agency to take the Agency's soil to use for his private purposes.

The Agency has met its burden of proving that Grievant engaged in misconduct when Grievant, without permission, took the Agency's Dump Truck containing soil belonging to the Agency and dumped the Agency's soil on Grievant's property for Grievant's private purposes.

#### Whether the Agency's discipline was consistent with law and policy

Theft or unauthorized removal of State property is a Group III offense.<sup>6</sup>

Grievant argued that the Agency's soil had minimal or no value such that when he took the soil, he was not engaging in theft for purposes of determining the appropriate level of offense, but rather that he was misusing state property (a Group II offense). Although the Agency did not assess a value to the soil, Manager credibly testified that the

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<sup>3</sup> Agency Ex. at 4.

<sup>4</sup> Agency Ex. at 4; Hearing recording at 18:15-18:31.

<sup>5</sup> The Department of Human Resources Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>6</sup> See, Attachment A, DHRM Policy 1.60

soil did have value or benefit to the Agency and described that the Agency used materials and soil dumped at the Agency-owned dump site for fill purposes on that site.<sup>7</sup> Further, Grievant's unauthorized appropriation of the Agency's soil was not incidental to his misuse of State property, like obtaining sheets of paper from misuse of a printer. Grievant's misuse of the Agency's Dump Truck was to assist him in fulfilling his intent to take, not misuse, the Agency's soil, for Grievant's own private purposes.

The soil that Grievant took was Agency property and Grievant did not have permission from the Agency to take the soil to use for his private purposes. Grievant's action thus constituted unauthorized removal or theft of the Agency's property.

Theft is a Group III offense. Accordingly, the Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee.

### Mitigation

Grievant argued that in its efforts to ensure consistency in the issuance of discipline, the Agency failed to appropriately consider mitigating factors, including the Grievant's long years of service and history of good performance evaluations.

The Standards of Conduct provide that an Agency may reduce the level of a disciplinary action if there are mitigating circumstances, such as conditions that compel a reduction to promote the interests of consistency, equity and objectivity, or based on an employee's otherwise satisfactory work performance.

In this case, Manager credibly testified that in determining the appropriate discipline for Grievant's misconduct, the Agency considered mitigating factors, including Grievant's long years of service and history of satisfactory performance.<sup>8</sup> But, because of the severity of Grievant's misconduct, the Agency determined that it was not appropriate to reduce the discipline.

Grievant argued that the Agency's soil had no or minimal value. Manager credibly testified that the soil did have value or benefit to the Agency and described that the Agency used materials and soil dumped at the Agency-owned dump site for fill purposes on that site. The Agency could have considered the value of the soil in order to mitigate the disciplinary action. That the Agency chose not to do so, however, is not a reason for the Hearing Officer to conclude that the Agency action exceeds the limits of reasonableness.

Virginia 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...."<sup>9</sup> Under the Rules for Conducting Grievance Hearings, "[a] hearing

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<sup>7</sup> Hearing recording at 42:05-45:00.

<sup>8</sup> Hearing recording at 21:48-22:38, 34:18-37:05, 56:48-59:08.

<sup>9</sup> Va. Code § 2.2-3005.

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. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

### **DECISION**

For the reasons stated herein, the Agency's issuance to Grievant of a Group III Written Notice of disciplinary action with termination is **upheld**.

### **APPEAL RIGHTS**

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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>10</sup>

*Angela Jenkins*

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Angela L. Jenkins, Esq.  
Hearing Officer

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<sup>10</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.