

Issue: Group II Written Notice with Suspension (unsatisfactory performance); Hearing Date: 04/15/13; Decision Issued: 04/22/13; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10047; Outcome: Full Relief.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10047**

Hearing Date: April 15, 2013

Decision Issued: April 22, 2013

#### **PROCEDURAL HISTORY**

On October 17, 2012, Grievant was issued a Group II Written Notice of disciplinary action with ten workday suspension for unsatisfactory work performance.

On October 24, 2012, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On March 12, 2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 15, 2013, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
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 employs Grievant as an Area Construction Engineer at one of its locations. He has been employed by the Agency for approximately 23 years. Grievant had prior active disciplinary action. He received a Group I Written Notice for unsatisfactory work performance.

A church was located near a road that the Agency wished to expand. The Agency took ownership of a significant portion of the church's front parking lot. The Agency hired a construction company to make major improvements to the road next the church. The Agency also hired a company to oversee the construction project. Ms. H worked as the Site Inspector who was responsible for being at the construction site on a daily basis and serving as the Agency's "eyes and ears" at the construction site. Ms. H was responsible for carrying out Grievant's instructions.

At some point the contractor placed some of its equipment and large concrete pipes next to the Agency's right of way but on the church's property. The Agency refers to this as an encroachment.

On July 1, 2011, the church's Pastor sent Grievant a letter stating, in part:

I am writing on behalf of [the church] regarding site construction activities adjacent to our property on [road].

We understand that the current construction easement crosses diagonally through our existing parking area on the south side of our Sanctuary. We also understand that it would be desirable from a construction access standpoint to encumber the entire parking area once construction activities commence next week.

This letter grants VDOT and its agents for this project permission to access the Church's property for the purposes of facilitating needed site work in this area.<sup>1</sup>

The church wanted certain additional services from VDOT but VDOT did not wish to provide them. On July 12, 2011, Grievant sent Ms. H an email stating:

I do not see any benefit to VDOT in what the church is providing. The Department has provided the necessary easements for the contractor to perform the work. If the contractor desires to access the areas noted by the church in the letter, the contractor may work out a separate agreement with the church. I do not see where VDOT should authorize or pay for any additional work outside of the easement as part of the project.

On July 26, 2011, the church Pastor wrote Grievant a letter stating:

Our letter, dated July 1, 2011, granted VDOT and its agents permission to access the Church's property for the purpose of facilitating needed site work in this area, and this is occurring on a daily basis. Our letter also granted permission for the remaining macadam paving on the church property to be permanently removed and for appropriate grading to be performed in that area. That has not yet been completed.

We have not heard back from you definitively on this and are interested to know whether this work will be included in the current [project] or whether the Church should include this work in the ongoing VDOT negotiations for our site plan reconstruction.<sup>2</sup>

On August 1, 2011, Grievant sent the church Pastor a letter stating:

As I understand it, you are offering to allow VDOT and its agents for the project access to the church property beyond the construction limits in exchange for installation of a safety fence adjacent to the church, removal of the macadam paving on the church property and additional grade work between the church walkways and the roadway sidewalk.

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<sup>1</sup> Agency Exhibit 5.

<sup>2</sup> Agency Exhibit 5.

We appreciate your offer and have discussed it with our contractor. Since the work would constitute an unnecessary addition to the project outside of the original construction limits, with associated costs, we have decided not to pursue your offer.<sup>3</sup>

The church had its owner representative send Grievant a letter dated August 9, 2011 and received by VDOT on August 15, 2011 stating:

You also may not realize that VDOT and its contractors are already using [church] property for construction access and staging without any corresponding consideration or compensation. I have included several photos taken on site last week showing these conditions.

Grievant took the church's letter and wrote a note to Ms. H saying:

Be sure the contractor stays within construction limits and easements. Thank you.<sup>4</sup>

Grievant delivered the letter with his note to Ms. H. Grievant did not further respond to the church's representative. No evidence was presented showing that Ms. H failed to carry out Grievant's instruction.

### **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."

"[U]nsatisfactory work performance" is a Group I offense.<sup>6</sup> In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

The Agency has not met its burden of proof in this case.

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<sup>3</sup> Agency Exhibit 5.

<sup>4</sup> Grievant Exhibit 1.

<sup>5</sup> The Department of Human Resource 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.

When the contractor first placed its equipment and materials on the church's property, it did so with the permission of the church. Grievant was not consulted by the contractor before the equipment was placed on the church's property. Grievant was not responsible for seeing that the equipment was removed until such time as the church notified him that it objected to placement of the equipment on its property.

It appears that the church wanted additional concessions from VDOT and when VDOT did not respond as the church requested, the church began emphasizing that the contractor was using its property without compensation. Once Grievant rejected the additional concessions, the church appears to have changed its position and determined that the contractor could not use its property without compensation. It sent Grievant a letter expressing its concerns and Grievant responded by having the Site Inspector tell the contractor to remove its equipment and materials from the church's property. No evidence was presented showing that the contractor failed to remove its equipment and materials from the church's property. Grievant testified that the Site Inspector was able to have the church and the contractor enter into an oral agreement to resolve the church's concern. In any event, there is no reason for the Hearing Officer to believe that the church objected to the contractor's behavior after Grievant told the Site Inspector to address the church's concern.

The Agency alleged that Grievant failed to fully investigate and resolve the improper use of private property by a VDOT contractor. It is unclear what additional investigation was necessary. Grievant received a letter from the church indicating it objected to use of its property. Attached to the letter were photographs of the improper use. There is no reason to believe that if Grievant had travelled to the location, he would have seen anything different from what was shown by the photographs. There is no evidence to show that Grievant failed to resolve the matter. Only if the contractor failed to remove the equipment and materials after the church complained would there be a basis to conclude that Grievant failed to resolve the improper use of private property. Neither party called the Site Inspector as a witness and there is no reason to believe that the Site Inspector did not relay Grievant's instruction to the contractor and have the contractor remove the items from the private property.

The Agency argued that Grievant failed to display a timely response to communications from a private owner, failed to inform VDOT management of the situation and improperly oversaw staff to resolve the situation. Grievant failed to send a reply letter to the church's August 2011 letter but that is not in itself sufficient to justify disciplinary action. Grievant responded to the letter by notifying the Ms. H who should have contacted the church and indicated she was acting on Grievant's behalf. Grievant failed to notify Agency management but there was no reason to do so if the matter had been resolved as Grievant believed it had been resolved. There is no reason to believe that Grievant failed to properly oversee Ms. H's actions with respect to the contractor's actions.

The Agency alleged Grievant weakened the Agency's position during settlement negotiations and placed significant risk on the Department. This allegation is speculative. The church initially gave the contractor permission to use its property for storage of equipment and materials. Thus, the church would not have a legal claim against the contractor or the Department for using private property without permission. There is no reason to believe that the church would have a claim against the Department after August 15, 2011 because no evidence was presented showing that the contractor failed to timely remove its equipment and materials as Grievant directed.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with a ten workday suspension is **rescinded**. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of suspension and credit for leave and seniority that the employee did not otherwise accrue.

## 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>7</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].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.