

Issue: Group III Written Notice with Termination (theft/unauthorized removal of State property); Hearing Date: 12/12/12; Decision Issued: 12/20/12; Agency: VDOT; AHO: Thomas P. Walk, Esq.; Case No. 9973; Outcome: No Relief – Agency Upheld.

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: CASE NO.: 9973

DECISION OF HEARING OFFICER

HEARING DATE: DECEMBER 12, 2012

DECISION ISSUED: DECEMBER 20, 2012

I. PROCEDURAL MATTERS

The grievant initiated these matters by filing his Grievance Form A on October 19, 2012. I was appointed as hearing officer on November 13, 2012. I conducted a prehearing conference by telephone, scheduling the matter for hearing for December 12. The hearing took place on that date and lasted approximately one hour ten minutes.

II. APPEARANCES

The agency was represented by a lay advocate.

A superintendent for the agency attended the hearing as the agency representative and also testified as a witness.

One additional witness testified on behalf of the agency.

The grievant represented himself. He testified and called two additional witnesses on his behalf.

III. ISSUE

Whether the agency acted appropriately in issuing to the grievant a Group III Written

Notice on September 20, 2012 and terminating him from employment?

IV. FINDINGS OF FACT

An anonymous telephone caller notified the agency on August 1, 2012 that an agency employee had been observed taking fuel from a motor vehicle of the agency. Photographs were supplied by the individual of the agency vehicle and a privately owned motor vehicle parked next to it. An investigation by the agency revealed that the other vehicle belonged to the grievant. An individual shown in the photograph was identified as the grievant.

On and around August 1 the grievant was working for the agency as a crew member at the work site at which the photograph was taken. The agency vehicle shown in the photograph was the one that had been assigned to the grievant for August 1. An agency employee conducted a review of the fuel transaction reports for the agency vehicle for July 31 and August 1. The report indicated an amount of fuel being pumped inconsistent with the number of miles the vehicle was driven between the July 31 and August 1 fuelings.

After additional investigation was conducted internally by the agency and yielded no conclusive evidence, the matter was referred to the Virginia State Police. On August 29 a special agent with the Virginia State Police interviewed the grievant. The grievant admitted to the officer that he had taken twenty gallons of fuel belonging to the agency over four different dates in July, 2012. Based on this information, the agency issued to the grievant a Group III Written Notice on September 20 and terminated his employment. The written notice charged him with

the theft or unauthorized removal of state property, namely approximately twenty gallons of fuel.

V. APPLICABLE LAW AND ANALYSIS

The Virginia Personnel Act, Chapter 29 of Title 2.2 of the Virginia Code, establishes the procedures and policies governing employment by the Commonwealth of Virginia. The Act provides for a Grievance Procedure. The Office of Employment Dispute Resolution within the Department of Human Resource Management has promulgated a Grievance Procedural Manual (“GPM”) and Rules for Conducting Grievance Hearings (“the Rules”). These documents govern this proceeding.

Section 5.8 of the GPM places the burden of going forward with the evidence on the agency in disciplinary actions. The burden of proving the allegations is with the agency as well. The standard of proof is by a preponderance of the evidence.

This case involves the disciplinary action taken by the agency against the grievant, namely the issuance of a Group III Written Notice (hereafter “The Notice”). Section VI (B) of the Rules requires a hearing officer reviewing disciplinary actions to make four determinations. Those determinations are:

- I. Whether the employee engaged in the described behavior;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and
- IV. Whether there were any mitigating circumstances to justify a reduction or removal of the disciplinary action and, if so, whether those mitigating circumstances were offset

by any aggravating circumstances.

The Written Notice alleges that the grievant committed an offense of the theft or unauthorized removal of state property. The Department of Human Resource Management has created and maintained Standards of Conduct regarding the actions of employees of the Commonwealth of Virginia. Policy 1.60 of the Department creates a tri-level scheme of offenses. Group III offenses are described as being those that are “of such a severe nature that a first occurrence should normally warrant termination”. The theft of state property falls within that category and is specifically listed by the Department as being subject to discipline as a Group III offense. The admitted thefts by the grievant clearly fall within the coverage of the Standards of Conduct. The grievant has not contested that he committed the offense, that it constitutes misconduct, or that the Group III discipline was consistent with policy.

The agency has met its burden with regard to the first three steps of the required analysis in this matter. The grievant presented evidence that a co-worker had stolen thirty gallons of fuel from the agency a few years earlier. That employee testified on behalf of the grievant. His recollection was that he had not been disciplined but merely required to make restitution. The agency presented an exhibit showing that the employee had received a Group III Written Notice and been suspended for two days. That discipline had been imposed by a different administrator than the one involved in this grievance.

I am allowed under the Rules to mitigate a discipline only if I find that the agency acted unreasonably. I cannot make that finding here. I distinguish the acts of the grievant from that of his fellow worker based on the grievant having stolen fuel on four separate dates. Although he expresses remorse for his actions and explained that he lost his temper over what he perceived to

be unfair treatment of him, such does not justify his unlawful taking of the property.

I am concerned, however, by the attempt by the agency to argue that the twenty gallons of fuel taken by the grievant had a value of approximately \$200.00. When asked by me about why the per gallon rate was so much higher than the going market rate at private facilities, the agency witness attempted to explain that it was due to the cost of additives. Despite my skepticism over this explanation, I do not find that it is sufficient evidence of bad faith or unreasonableness for me to lessen the punishment given the grievant.

VI. DECISION

For the reasons stated above, I hereby uphold the decision of the agency to issue a Group III Written Notice to the grievant and to terminate him from employment.

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 14th St., 12th 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 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to 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.^a

[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].

SO DECIDED this December 20, 2012.

/s/Thomas P. Walk

Thomas P. Walk, Hearing Officer

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