DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 11982, 11986

Hearing Date: July 25, 2023
Decision Issued: July 31, 2023

PROCEDURAL HISTORY

On March 20, 2023, Grievant was issued a Group I Written Notice.[1] On April 6, 2023, Grievant timely filed a grievance challenging the Agency's actions.[2] On March 20, Grievant was issued a Group II Written Notice. On April 6, 2023, Grievant timely filed a grievance challenging the Agency's actions.[3] On June 9, 2023, the Director of the Office of Employment Dispute Resolution (EDR) issued Consolidation Ruling Number 2023-5567. The grievance was assigned to this Hearing Officer on June 12, 2023. No disciplinary action was taken for either of the Group Written Notices. A hearing was held on July 25, 2023.

APPEARANCES

Agency Counsel
Agency Representative
Grievant
Witnesses, in person and telephonically

ISSUES

Was Grievant's performance unsatisfactory regarding a weather event? Was Grievant's performance unsatisfactory and did Grievant fail to follow instructions or policy regarding a road repair event?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[4] Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's

[1] Agency Exhibit 1, Page 3
[2] Grievant Exhibit 1, Page 2
[3] Grievant Exhibit 1, Page 2
[4] See Va. Code § 2.2-3004(B)

alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus, the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. [5] However, proof must go beyond conjecture.[6] In other words, there must be more than a possibility or a mere speculation.[7]

FINDINGS OF FACT

After reviewing the evidence presented, I make the following findings of fact:

The Agency submitted a notebook containing pages 1 through 94. Grievant had no objection to the contents of this notebook and it was accepted in its entirety as Agency Exhibit 1.

Grievant submitted a notebook containing pages 1 through 153. The Agency, other than to the materiality of some pages, did not object to the contents of this notebook. It was accepted as Grievant's Exhibit 1, and I reserved the right for the Agency to object to specific pages during the hearing.

During the course of this hearing, 5 levels of management either testified before me or were referenced in the documentary evidence. For purposes of this decision, they will be referred to as

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[5] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

[6] Southall, Adm'r v. Reams, Inc., 198 Va. 545, 95 S.E. 2d 145 (1956)

[7] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

follows: Grievant, who was supervised by 3, who was supervised by 2, who was supervised by 1. Grievant supervised 5. Both Written Notices were issued by 2. The Grievant, along with 1, 2, and 5 were witnesses.

Grievant is a maintenance superintendent. As such and as a part of his job description, during emergency operations, it is essential for Grievant "*... to work in these situations. Report to work when called. Maintain communications with supervisor. Keep abreast of weather forecast for duty readiness in reporting. Be prepared to operate equipment in all kinds of weather."*[9]

On February 10, 2023, at 2:31 PM, 3 sent an email to numerous people, Grievant being one of the recipients, that *"…Based on the latest forecast, night crew will be reporting on Saturday night at midnight at a level one skeleton crew, with a supervisor or crew leader in charge…"*[10]

Subsequently, on February 11, 2023, at 12:40 PM, he sent an email stating in part that "…*Update – night crew won't be reporting tonight at midnight, we'll be on call back status. We'll evaluate the situation tomorrow morning relating to reporting tomorrow night for the potential of re-freeze. I'll be back to everyone by late morning with more information…"*[11]

At 10:35 AM, February 12, 2023, he sent a third email stating: "*Update – night crew will be reporting tonight (Sunday) at a level 2, to address road impacts due to refreeze and black ice conditions, and work until 8 AM. If at any time you feel you need additional resources, do what you need to do, but keep me abreast of your plans, so I can make the necessary notifications and update our MOB Plan."*[12] This email was sent to many, including Grievant and 1, 2, and 5.

Grievant testified that he left work at approximately 3:00 PM, on Friday, February 9, 2023. He testified that he was in touch with 5 regarding the emails sent by 3. The Agency did not dispute this. There was no dispute that all who were supposed to report Sunday night did report. 5 was the supervisor of this shift. There was undisputed testimony that 5 and another supervisor, from 3:00 AM to 5:00 AM drove their respective pickup trucks over the roads of this region to check for ice, re-freeze, or black ice. They reported none.

At 6:22 AM, Monday, February 13, 2023, an email was sent by 3 asking: *"Good morning, Folks…how are the roads this morning? Any issue with refreeze?*[13]

Grievant, who has the necessary equipment in his vehicle to measure both road and outside temperature, found no such conditions as he reported for work Monday morning. Grievant testified that he received a call at approximately 8:00 AM, Monday, February 13, 2023, that there was freezing on a bridge surface. Grievant sent an email to 3 at 8:16 AM, Monday, February 13, 2023, stating: "*We are having bridges starting to {refreeE} crews are [e] route*"[14]

[9] Agency Exhibit 1, Page 91
[10] Agency Exhibit 1, Page 16
[11] Agency Exhibit 1, Page 15
[12] Agency Exhibit 1, Page 16
[13] Agency Exhibit 1, Page 14
[14] Agency Exhibit 1, Page 14

As a result of ice, re-freeze, or black ice, there were several accidents Monday morning. On Tuesday, February 14, 2023, at 9:59 AM, an email was sent by 3 stating in part "… *it's apparent we weren't proactive enough in pre-treating icy/black ice conditions* ***in some areas****. In some cases, our dump trucks were sitting, and the engines hadn't been started at all during the night. And, in some cases we didn't have any responses until after 8am yesterday morning, when it was too late to prevent any icing impacts to our roadways and bridges.*

I wanted to take a moment to make sure we all have a clear understanding of our weather event responses, ***particularly night crew****, but not limited to. In any scenario, including imminent switch over from rain to freezing rain/sleet, the expectation is for our crews to be out on their assigned routes with loaded trucks* ***monitoring and/or pretreating*** *roads and bridges BEFORE icing occurs. Also, sending supervision out in pickups to monitor roads and bridges is required until the threat of icing is over with.* ***Also moving forward****, the expectation* ***(required)*** *is we have our loaded trucks on their snow assignments as well, until the threat of icing is over. After their snow assignments have been pretreated, they are to find a safe place to park on (or close) to their routes and remain there until the threat of icing is over."*[15] **(Emphasis added)**

There is no dispute that the Grievant notified 5, the supervisor of the night shift, as he was required. There was no dispute that 5 and another supervisor, were out in pickup trucks monitoring the roads and bridges from approximately 3:00 to 5:00 am. There was no evidence that 5 was new to the role of supervisor or that he lacked the ability to properly perform the functions required of him in that role. Grievant was properly at home when the night shift in question commenced. The author of both Written Notices, 2, testified that 5, the night shift supervisor, was the person in charge of the night shift and had the same authority over that shift as the Grievant had over both day and night shifts. I heard no testimony from any Agency witness as to a requirement that Grievant call 5, the supervisor on duty, hourly or every 2 hours or every 3 hours to check and see if 5 was properly doing his job. A witness testified that there was no guidance regarding loading trucks or preparing trucks. His undisputed testimony was that "sometimes we do and sometimes we do not." This testimony is supported by the email 3 sent on Tuesday morning, wherein he said that "***Also moving forward****, the expectation (****required****) is we have our loaded trucks on their snow assignments as well, until the threat of icing is over."*

Agency, in its Exhibit 1, introduced as evidence a handwritten response of Grievant, dated March 20, 2023, to the Group I Written Notice. In this response, Grievant stated in part as follows: *[2] went on to say a certain temp that roads/bridges are to be treated. I asked what that was, he did not know. Said Richmond Dist.& Fredericksburg Dist. has this established. I reminded him he attended the Culpepper District Snow Conference and the temperature he was referencing was not discussed. In my time at VDOT 37 years as a Superintendent no such certain temperature has ever been discussed.*"[16] In his testimony before me, 2 was not asked to deny the accuracy of this statement. As such, it becomes a part of the Agency's proffered evidence.

Based on the on/off/on nature of the emails from 3 in this matter, it is clear that weather is not predictable. When 3 says "*we were not proactive enough in some areas,"* he offers no definition of what constitutes an area and he does not define proactive. Supervision was doing what seemed to be called for in monitoring or looking for problem spots. When questioned by the Hearing Officer, 1

[15] Agency Exhibit 1, Page 11
[16] Agency Exhibit 1, Page 6

admitted that there was no strict rule or guideline as to exactly when to pre-treat roads. Do you treat if the forecast is for temperatures of 35, 34, 33, 32, 31, or 30 degrees? If all current reports are that there is no icy condition, do you pre-treat regardless? As 1 said, there are situations where the decision is based on best guess or feeling. The Agency takes the position that Grievant either was fully responsible for what 5 did not do or should have done, or, when Grievant came to work Monday morning, he should have dispatched trucks and commenced treating the roads, but as 3 stated in his email of February 14, 2023, "*…it was too late to prevent any icing impacts to our roadways and bridges."*

The Agency, as testified to by 1, took the following language from Grievant's due process response to this written notice as an admission of guilt. "*I have no excuse as to why the trucks were not started and pre trips done upon arrival at 12:00 AM. Without this there is no guarantee the trucks are ready when needed."*[17] As Grievant testified, this is a statement regarding 5, the supervisor on duty at the time. Grievant had no excuse for why 5 had not done what the Agency, in hindsight, wished he had done. 5 testified before me. He was not asked why he did not start the trucks or send them out.

In the Notice of Intention to Issue Disciplinary Action, 2 stated in part *"…In this incident, you failed to ensure your staff performed their duties in keeping the travel public safe*."[18] Other than being physically present at the night shift, it is purely speculative as to what Grievant could have done to ensure 5 performed his duties properly. And that assumes he did not properly perform his duties. If Grievant is responsible for the failure of 5, then 3 is responsible for the failure of Grievant and 2 for the failure of 3 and 1 for the failure of 2.

The closer issue is what should Grievant have done when he reported to work Monday morning. His testimony was that on the subset of roads he traveled, there were no icy conditions. There was no evidence that icy conditions existed prior to Grievant receiving a phone call around 8:00 AM. In a perfect world, the employees of this Agency would have been able to accurately forecast the when and where of dangerous conditions. But the evidence before me is that it is not a perfect world and sometimes management has to make judgment calls based on experience, gut feeling or just by the proverbial seat of the pants.

Indeed, 3 seems to establish a new paradigm "**moving forward"**. But of course, he does not define what constitutes "**until the threat of icing is over**." (**Emphasis added**) He also does not make any attempt to define when action should be taken. It would be very simple for the Agency to simply adopt a policy that when the ambient temperature reaches a certain level, all roads and bridges will be pre-treated. It appears from the Agency's own evidence that at least two Districts have done just that by establishing fixed temperatures for treating roads and bridges. Of course, the problem here is that you remove all opportunity for actual observation of the roads and bridges and simply make the decision based on a temperature. This likely results in a waste of taxpayer funds, something the Agency repeatedly pointed out that they were careful not to commit such waste. Unless the Agency is willing to have a policy to treat all roads and all bridges, based on temperature alone, sometimes, through no fault of the Agency, bridges and roads will ice and become dangerous. I find that the Agency has not met its burden of proof that Grievant's job performance regarding the Group I

[17] Agency Exhibit 1, Page 10
[18] Agency Exhibit 1, Page 2

Written Notice was unsatisfactory.

The Group II Written Notice involved the patching of 1,500 feet of highway without prior written or electronic approval from the District Maintenance Engineer (DME).[19] On August 8, 2020, the Agency entered into a contract with a contractor to provide asphalt patching, milling, and incidental paving.[20] This contract provided for four annual renewal options. On September 16, 2020, a copy of this contract was emailed to numerous people at the Agency, including Grievant.[21] Section IV(E) of the contract states as follows: "*Pavement patching operations shall be limited to no more than 500 feet in length and Planning/Milling shall be a minimum of no less than four feet in width and no less than 10 feet in length. VDOT contract administrator or designee will make this determination of repair dimensions at each location.* ***Patches that will exceed 500 feet in length must have pre-approved written or electronic approval from the District Maintenance Engineer period***."[22](**Emphasis added**)

This contract was renewed on July 21, 2022, and was in effect on the dates involved in this matter.[23]

Grievant testified that he notified 3 of the need to patch. This was done by email dated February 21, 2023.[24] Grievant was notified on a Sunday that the contractor would be able to start work the following day. In his due process response to this Written Notice, Grievant stated: "*I got notified the date before the work was started that [contractor] would be on site the next day. This was a Sunday. I was not thinking about the approval request at the time. 5 called me on Monday to let me know if I knew the patch was over 500 feet. I said, yes, I put in the request, but had forgotten about it when I got notified they were going to start on Monday, and that since they were there we would need to go with the work. Assuming previous guidance there would be no issues as long as we made notification."*[25]

Further, in his Due Process response, Grievant wrote: "*I feel DME would have approved if he had gotten to location in time. The delay in the request being forwarded and early arrival of [contractor] I feel contributed to the work being done before approval. I stated earlier, guidance of previous RE just needs to be notified... I was working from the latest guidelines. I had been told. I made the request and justification. With the workload of [contractor] you need to move when they are available, or your work plan may get delayed period*."[26]

The DME testified that when he first arrived at the work site, the patching was completed. He stated that there are several possible long and short-term considerations regarding work of this scope and character. Is the repair contemplated correct in the short term when considering what may be needed in the long term, is it cost effective, and does it protect the public? All of these considerations were negated by the work being done before he could sign off and give his approval. It is clear that Grievant was aware of the need for prior written or electronic approval for a patch of

[19] Agency Exhibit 1, Page 19
[20] Agency Exhibit 1, Pages 26 - 58
[21] Agency Exhibit 1, Page 24
[22] Agency Exhibit 1, Page 34
[23] Agency Exhibit 1, Page 58
[24] Grievant Exhibit 1, Page 42
[25] Agency Exhibit 1, Page 22
[26] Agency Exhibit 1, Page 23

this magnitude. It is clear that 5 focused his attention on that requirement immediately before the work commenced, and it is clear that Grievant made a knowing decision to move forward without the necessary approvals. Relying on what was done in the past did not obviate the need to comply with the terms of the contract. As such, his performance was unsatisfactory and failed to follow policy. Accordingly, I find the Agency has met its burden of proof regarding the Group II Written Notice.

MITIGATION

Va. Code § 2.2-3005(C)(6), authorizes and grants Hearing Officers the power and duty to receive and consider evidence in mitigation or aggravation of any offense charges by an Agency in accordance with rules established by EDR. The Rules for Conducting Grievance Hearings ("Rules"), provide that a Hearing Officer is not a super personnel officer. Therefore, in providing any remedy, the Hearing Officer should give the appropriate level of deference to actions by the Agency management that are found to be consistent with law and policy. Specifically, in disciplinary grievances, if the Hearing Officer finds that (1) the employee engaged in the behavior described in the Written Notice; (2) the behavior constituted misconduct; and (3) the Agency's discipline was consistent with law and policy, then the Agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.

Hearing Officers are authorized to make findings of fact as to the material issues of the case and to determine the grievance based on the material issues and the grounds and the records for those findings. The Hearing Officer reviews the facts *de novo* to determine whether the cited actions constitute misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action. The Hearing Officer has the authority to determine whether the Agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.

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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

I find there is no reason for me to mitigation in this matter.

DECISION

For the reason stated herein, I find the Agency has borne its burden of proof in this matter regarding the Group II Written Notice and has not borne its burden of proof regarding the Group I Written Notice.

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 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 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.[1]

[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].

William S. Davidson

William S. Davidson, Hearing Officer

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