

Issue: Group III Written Notice with Suspension (leaving work without permission);
Hearing Date: 06/15/18; Decision Issued: 06/19/18; Agency: VDOT; AHO: Carl
Wilson Schmidt, Esq.; Case No. 11201; Outcome: Partial Relief; **Administrative
Review: Ruling Request received 07/05/18; EEDR Ruling No. 2019-4756 issued:
07/26/18; Outcome: Remanded to AHO; Remand Decision issued 07/27/18;
Outcome: Group III Written Notice with Suspension upheld.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11201

Hearing Date: June 15, 2018

Decision Issued: June 19, 2018

PROCEDURAL HISTORY

On January 3, 2018, Grievant was issued a Group III Written Notice of disciplinary action with a five workday suspension for leaving a mobile work unit and endangering the safety of other crew members.

On January 30, 2018, 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 May 7, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On June 15, 2018, 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. 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:

The Virginia Department of Transportation employs Grievant as a Transportation Operator II at one of its facilities. He has been employed by the Agency for approximately five years. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant worked on a crew responsible for filling potholes on Virginia highways. The Agency used three trucks and four crew members to serve as a mobile work unit locating and filling potholes. The First Truck was a dump truck containing the mix used to fill potholes. The Second and Third Trucks were vehicles with mounted attenuators. These trucks were called crash cushion trucks. When the attenuator was lowered behind the truck it served as a cushion or barrier to absorb the blow of a vehicle crashing into the back of the truck. A crash cushion truck also had boards with blinking lights forming an arrow to point to the left or the right so that motorists know to move to their left or right to avoid a work area.

When filing a pothole, the Dump Truck was to be positioned in front of the pothole. The Second Truck was to be positioned in the lane behind the pothole to protect the crew repairing the hole. The Third Truck was to be positioned approximately 1000 feet behind the Second Truck.

The Highway was two lanes heading west and two lanes heading east. The west and east bound lanes were separated by an area with grass, bushes, and trees.

The Pothole was approximately 3 inches to the right of the center lane of the eastbound Highway. The Pothole was approximately 18 inches in diameter and 3 to 4 inches deep. The Pothole was located in part of the road after a hill. While standing at the Pothole and looking backwards towards oncoming traffic, one could not see 1000 feet behind the Pothole. The view would be blocked by the descending portion of the hill.

On December 14, 2017, Grievant, Mr. C, Mr. T, and Mr. D were in the shop preparing to leave for the day. They participated in an approximately 15 minute safety meeting. Mr. C was the crew leader. Mr. C told Grievant to operate the Third Truck. Grievant inspected the Third Truck and noticed that its radio did not work. He obtained a hand held radio and told the other employees he would use the hand held radio.

Mr. C and Mr. T were in the Dump Truck. Mr. D was operating the Second Truck which was a crash cushion truck. Grievant was operating the Third Truck. Grievant's worksite was the mobile unit.

The crew began filling potholes on the west bound side of the Highway. Grievant noticed a Homeless Man on the side of the road near a Restaurant. When they reached closed to the county line, they made a U-turn to change from facing the westbound lanes to driving on the eastbound lanes. The mobile unit travelled at approximately 15 miles per hour.

Grievant decided to separate from the mobile unit to cross back to the westbound lane to give the Homeless Man money. He used the hand held radio to announce to the two other trucks that he was going to stop to give the Homeless Man some money. He did not receive any response from Mr. C because Grievant's radio transmission failed. Grievant assumed the drivers of the two other trucks had heard his radio transmission even though they had not heard Grievant.

Grievant turned his vehicle to his left and crossed through a passing area to enter the westbound lanes of the Highway. He drove to the beginning of a right turn lane in front of a Restaurant and stopped his vehicle. He got out of the vehicle and walked to the Homeless Man. Grievant asked the man if he wanted some money. The man said "yes." Grievant gave the man some of Grievant's money and then returned to his vehicle.

Once Grievant had turned towards the Homeless Man, the other two trucks continued eastbound on the Highway at approximately 15 miles per hour. They travelled approximately 3.1 miles to the Pothole. The Dump Truck parked in front of the Pothole. Mr. C and Mr. T got out of the Dump Truck and began working to fill the Pothole. Mr. D parked the Second Truck approximately 40 feet behind the Dump Truck.

Mr. D got out of the Second Truck and walked to the two men working at the Pothole. The Second Truck was at the top of the hill with the Pothole at the bottom of the hill.

After giving money to the Homeless Man, Grievant drove the Third Truck westbound a short distance and made a U-turn to begin driving eastbound. He was driving at the speed of approximately 45 to 55 miles per hour to catch up with the other two vehicles. Grievant parked approximately 1000 feet behind the Second Truck. Grievant watched Mr. D get out of the Second Truck to walk to the Pothole. Grievant could not see Mr. C and Mr. T working at the Pothole because they were on the other side of the hill.

Grievant attempted to contact Mr. C using his hand held radio to let Mr. C know he was in place. Grievant waited for a response from Mr. C but did not receive one. Grievant used his personal cell phone to call Mr. C's cell phone. When Mr. C answered, Grievant said, "All right I'm back, I had to do something, but I'm back." Mr. C said "what do you mean you are back, man, we are out here filling holes." Mr. C understood Grievant to mean that he had just rejoined the group after approximately ten minutes had passed and they finished filling the Pothole. Mr. C believed Grievant had gotten in place at the time of the cell phone call and not before that time even though Grievant had rejoined the mobile unit at the time Mr. D exited the Second Truck. Mr. C decided not to go to the next pothole and instead took the crew to the shop to inform his supervisor.

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."¹ 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."

"Leaving work without permission" is a Group II offense. This includes leaving the worksite. On December 14, 2017, Grievant left the mobile worksite without permission from Mr. C. He did not have the independent authority to decide whether to leave the mobile unit. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant's five workday suspension is upheld.

The Agency argued Grievant should receive a Group III Written Notice for endangering the safety of the employees filling the Pothole. The evidence is not

¹ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

sufficient to establish this point. Only Grievant was in a position to see when he rejoined the group. The three other men were at the Pothole and unable to see (or did not see) when Grievant got into position on the Highway. Grievant testified he drove approximately 45 to 55 miles per hour over approximately 3.1 miles to catch the slower moving trucks. He testified he observed Mr. D get out of the Second Truck to walk to the Pothole. Mr. D got out of the Second Truck at the start of the filling of the Pothole, not the end. If Grievant observed Mr. D get out of his truck at the beginning of the process to fill the Pothole, then Grievant was in place as scheduled. Grievant used his cell phone to call Mr. C. This is consistent with Grievant's assertion that he was in position and tried using his hand held radio to inform Mr. C he was in position but the hand held radio did not work. After time passed and Grievant did not receive a radio response from Mr. C, Grievant chose to call Mr. C using a cell phone. The amount of time that passed before Grievant realized his hand held radio call was not working explains the delay in Grievant calling Mr. C using his cell phone.

Va. 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"² Under the *Rules for Conducting Grievance Hearings*, "[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. 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 further the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with a five workday suspension is **reduced** to a Group II Written Notice with a five workday suspension.

APPEAL RIGHTS

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

² Va. Code § 2.2-3005.

Please address your request to:

Office of Equal Employment and 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 EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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



COMMONWEALTH of VIRGINIA
Office of Equal Employment and Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case No: 11201-R

Reconsideration Decision Issued: July 27, 2018

RECONSIDERATION DECISION

On July 26, 2018, EEDR issued Ruling 2019-4756 stating:

The hearing officer has misapplied state and/or agency policy in failing to uphold the disciplinary action as a Group III. Leaving an agency MOU, which the hearing officer has found occurred in his factual findings, is appropriately considered a disciplinary action at the Group III level under policy. Accordingly, the matter must be remanded to the hearing officer for revision of his determinations in this case to be consistent with this ruling.

The Ruling means the Group III Written Notice with a five work day suspension is upheld.

APPEAL RIGHTS

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 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 the Director before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer