

Issue: Group II Written Notice (violation of safety rule); Hearing Date: March 20, 2002;
Decision Date: April 11, 2002; Agency: Department of Transportation; AHO: Carl
Wilson Schmidt, Esquire; Case Number: 5403; **Judicial Review: Appealed to
Circuit Court of City of Hampton [May 8, 2002]; Outcome: pending**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5403

Hearing Date: March 20, 2002
Decision Issued: April 11, 2002

PROCEDURAL HISTORY

On November 19, 2001, Grievant was issued a Group II Written Notice of disciplinary action for:

Violating a safety rule where there is not a threat of bodily harm: On Nov. 28, 2001, you used gasoline to clean tape off a desk in the No. Island Emergency Garage Office. Using gasoline as a cleaning agent is prohibited, as stated in the Commonwealth of Virginia Department of Transportation safety rules.

On November 26, 2001, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On March 1, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 20, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee

Agency Counsel
Operations Manager I
HR Generalist
Two Bridge Tunnel Patrol Supervisors
Two Safety Service Patrollers
Welding Senior

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action.

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 a Bridge Tunnel Patrol Supervisor. On October 29, 2001, Grievant was working as a Safety Service Patroller. He had volunteered for extra work in a non-supervisory position to assist with the Agency's staffing concerns.

During Grievant's shift on October 29, 2001, he used a small amount of gasoline to clean tape off of a desk where he was working. He had some discussions with two other employees regarding whether the desk smelled of gasoline. When these employees noted they could smell gasoline, Grievant attempted to remove the odor with water and a cleaner. Grievant believed the smell was eliminated by the time he left his shift at 10 p.m. The Safety Service Patroller (SSP) for the next shift arrived at work, sat at the desk, and began doing paperwork. He immediately noticed an odor that he could not identify. Thirty minutes later, he began having headaches. He could not locate the source of the odor, but thought his gloves might be causing the odor. He put his gloves outside and got another pair of gloves. The odor remained. For the next hour and a half, he conducted his routine duties involving activities away from the desk and near the desk. Eventually, the SSP became nauseous. He spoke with the two employees Grievant previously had spoke with and they told him Grievant had used gasoline to clean the desk. The SSP decided to seek medical attention and went to the hospital.

The hospital physician concluded that the SSP suffered carbon monoxide poisoning. The SSP returned to work at approximately 3 a.m. to complete his shift.

The Agency completed an investigation and concluded that other uses of gasoline did not cause the SSP's injuries.

CONCLUSIONS OF LAW

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." P&PM § 1.60(V)(B).¹ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." P&PM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." P&PM § 1.60(V)(B)(3).

"Failure to ... comply with established written policy" is a Group II offense.² "Violating a safety rule where there is not a threat of bodily harm" is also a Group II offense.³ The Agency's Safety Rules state, "The use of gasoline to start a fire or as a cleaning agent is prohibited."⁴ Grievant received adequate notice of the Agency's Safety Rules.⁵ Grievant used gasoline as a cleaning agent. His actions were contrary to the Agency's safety policy and it is appropriate for the Agency to issue a Group II Written Notice.

Grievant contends that the SSP's injuries were overstated.⁶ It is not necessary for the Agency to prove injuries resulted from Grievant's failure to follow safety rules in order to meet its burden of proof.⁷ If the Hearing Officer assumes for the sake of

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

² P&PM § 1.60(V)(B)(2)(a).

³ P&PM § 1.60(V)(B)(2)(b).

⁴ Agency Exhibit 1.

⁵ On September 5, 2001, Grievant signed a statement saying, "THIS IS TO CERTIFY THAT I HAVE RECEIVED A COPY OF THE SAFTY RULES AND SAFETY INSTRUCTIONS OF THE VIRGINIA DEPARTMENT OF TRANSPORTATION AND HAVE READ THEM OR HAVE HAD THEM READ TO ME. I AM FAMILIAR WITH THESE RULES AND INSTRUCTIONS AND WILL BE GOVERNED BY THEM." Agency Exhibit 2.

⁶ Grievant and the SSP have a history of conflict and Grievant contends the SSP overstated his injuries in order to further his conflict with Grievant.

⁷ Had the Agency issued Grievant a Group III Written Notice for "Violating safety rules where there is a threat of physical harm", then the degree of injury to the SSP would be of greater significance.

argument that the SSP's injuries were not genuine or not caused by Grievant's actions, the outcome of this case is the same – Grievant acted contrary to an established written safety policy thereby justifying a Group II Written Notice.

Grievant contends the Written Notice is ineffective because the wrong supervisor issued it. He contends his immediate supervisor during his shift was not the person who issued the Written Notice. Grievant's argument fails because it is not necessary for an employee's immediate supervisor to issue a Written Notice. DHRM Policy 1.60, states that "Management should issue a Written Notice as soon as possible after an employee's commission of an offense."⁸ As long as someone in management issues the Written Notice, the notice is properly issued.

Grievant contends the Safety Rules are not enforceable against him because the Agency does not comply with portions of its own rules. He offered examples including failing to conduct five minutes safety meetings before each shift begins, failing to coordinate tunnel traffic lights, and failing to properly remove wandering pedestrians from the tunnel area. Grievant's argument is untenable. There are over 30 rules and instructions listed in the Agency's policy. The Agency's failure to enforce one or two of its policies does not necessarily mean the entire policy is not enforceable.⁹ The Hearing Officer believes that the Agency does enforce its policy throughout the Commonwealth but some of its policies are not applicable to every Facility. Grievant has not offered any evidence that the Agency has previously failed to enforce the gasoline cleaning restriction.

DECISION

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

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

⁸ P&PM § 1.60(VII)(b)(1).

⁹ The Hearing Officer is not suggesting he agrees that all of Grievant's examples reflect a failure to follow safety rules. Rather, the Hearing Officer concludes that even if Grievant's examples show violations of safety rules, Grievant has shown an insufficient number to render the policy unenforceable.

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar days** of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 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 EDR or 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.

Carl Wilson Schmidt, Esq.
Hearing Officer