Issue: Group II Written Notice (failure to follow supervisor's instructions and failure to comply with established written policy); Hearing Date: June 26, 2002; Decision Date: June 27, 2002; Agency: Department of Transportation; AHO: David J. Latham, Esquire; Case Number: 5465

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5465

Hearing Date: June 26, 2002
Decision Issued: June 27, 2002

APPEARANCES

Grievant
Attorney for Grievant
Three witnesses for Grievant
Maintenance Operations Manager
Representative for Agency
Five witnesses for Agency

ISSUES

Did the grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of corrective action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued for failure to follow a supervisor's instructions and failure to comply with established written policy on February 5, 2002.[1] Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2]

The Virginia Department of Transportation (VDOT) (hereinafter referred to as "agency") has employed grievant as an operator for two years, six months. Grievant is considered a hard worker and one whose performance and work ethic is above average.

The resident engineer issued to his superintendents a memorandum on tree trimming practices, which provides that trees should not be cut on private property unless it is in the best interest of the agency, and that trees should be cut in six-foot lengths.[3] The agency issued a similar but more detailed tree trimming policy, which requires that written permission must be requested from the property owner before entering and performing any required work on private property.[4] Grievant was not given a copy of either policy prior to the date of the alleged offense.

On February 5, 2002, grievant's crew was assigned to clean up debris from storm damage. During the storm, trees and branches had fallen on roads and rights-of-way. The night shift had cleared the roads for traffic by moving debris off the roadways. Grievant was assigned to cut up the debris and others on the crew would haul the debris to a disposal site. After cleaning up one secondary road, the crew leader and another employee drove a truckload of debris to a disposal site. The crew leader did not give grievant any instructions about what to cut or what not to cut. Grievant drove to the next assigned secondary road and began cutting fallen trees. When the person assigned to work with grievant arrived at the site, he noticed that grievant was cutting trees well off the road and right-of-way.[5] When he told grievant that he was off the right-of-way, grievant immediately stopped cutting.

It was later determined that grievant had cut three trees that were on private property. The largest tree had fallen across the road during a storm approximately two or three years earlier and had been pushed off the right-of-way with heavy equipment.[6] The stump of the tree is about 22 feet from the right-of-way; the upper portion of the tree is approximately on the edge of the

[1] Exhibit 3. Written Notice, issued February 19, 2002.
[2] Exhibit 12. Grievance Form A, filed March 1, 2002.
[3] Exhibit 1. Memorandum from resident engineer to superintendents, March 5, 2001.
[4] Exhibit 2. Memorandum to resident engineer from district maintenance engineer, January 2, 2002.
[5] The right-of-way for most secondary roads is 30 feet. The boundary for the right-of-way is therefore 15 feet from the centerline of the road.
[6] Exhibit 7. Three photographs of tree with upended root system still intact.

right-of-way. The second, smaller tree had been partially pushed over by the large tree and was leaning away from the road.[7] The stump of the second tree is about eight feet off the right-of-way while the last cut grievant made was 36 feet off the right-of-way. The third tree was a standing five-foot snag that remained from a tree that had fallen many years ago; it was located about eight feet off the right-of-way.[8]

On the evening of February 5, 2002, the property owner called the agency and was very upset because trees had been cut on his property without his permission. Since then, the property owner has threatened to sue both the agency and grievant, and is seeking monetary compensation. When the supervisor asked grievant if he cut the trees, grievant readily acknowledged that he had cut them. Grievant also offered to apologize to the property owner.[9]

Grievant's supervisor was not at the work site on February 5, 2002 because he had been directed to pick up supplies at another location and perform other assignments. Grievant's supervisor admitted that it is very common to get off the right-of-way while cutting trees.[10] The supervisor acknowledged that he issued a Group II Written Notice to grievant because the landowner had complained.[11]

On August 23, 2001, grievant had cut cedar trees using a boom axe and a property owner complained. The resident engineer came to the site that day and told grievant not to use a boom axe on trees in the future. Both the maintenance operations manager and grievant's superintendent confirm that grievant was not counseled regarding rights-of-way after this incident.[12]

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

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[7] Exhibit 10. Five photographs of smaller (8-10" diameter) tree.
[8] Exhibit 6. Four photographs of snag and upper portion of rotting tree.
[9] Testimony of the grievant's supervisor.
[10] Exhibit 11. Synopsis of meeting, April 12, 2002.
[11] Exhibit 11. *Ibid.*
[12] Exhibit 11. *Ibid.*

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.[13]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the Code of Virginia, the Department of Personnel and Training[14] promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. Section V.B.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior which are more severe in nature than Group I offenses and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Failure to follow a supervisor's instructions or comply with established written policy are Group II offenses.[15]

When it becomes necessary for management to address an employment problem such as unacceptable performance, the Standards of Conduct provides that one form of corrective action is counseling. Counseling may be either an informal discussion or part of an interim evaluation. Typically, an informal discussion takes place between an employee and his supervisor and may be documented in a written memorandum.[16] A group meeting with several employees present is not an appropriate setting for counseling because an employee may assume that the supervisor's comments are directed to someone else in the group. Counseling should include a description of the unacceptable

[13] § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual,* effective July 1, 2001.
[14] Now known as the Department of Human Resource Management (DHRM).
[15] Exhibit 4. Section V.B.2.a, DHRM Policy 1.60, *Standards of Conduct*, September 16, 1993.
[16] Exhibit 4. Section II.B.1, *Ibid*.

performance, an explanation of why the performance is not acceptable, and suggestions for making the performance acceptable in the future.

The basic facts in this case are undisputed. Grievant cut three trees located on private property, off the state right-of-way. The property owner had not granted permission to cut the trees and was unaware that grievant was cutting them until after the fact. Grievant cut the trees in three-foot lengths rather than the six-foot length specified by agency policy. Thus, grievant's actions violated two requirements of the agency's established written policy on tree trimming. The issue in dispute is what corrective action is appropriate for this offense.

The written notice in this case was issued, in part, because the supervisor stated that grievant had been counseled previously and therefore considered this a factor that supported the offense. A preponderance of the evidence leads to the conclusion that grievant was <u>not</u> previously counseled. Even if any of the conversations subsequent to the August 23, 2001 incident could be considered counseling, grievant was only admonished not to use boom axes on trees – he was not counseled about rights-of-way. Therefore, this cannot be considered as a circumstance that supports the discipline.

The written notice cites grievant for failing to follow a supervisor's instructions. However, the undisputed evidence establishes that grievant's supervisor was not present at the worksite until late in the workday, well after grievant had cut the trees. Moreover, the crew leader (the acting supervisor on February 5, 2002) was also not at the worksite during the time when grievant cut the trees. Grievant understood his instructions from the crew leader to be, "Clear storm-damaged trees." While the crew leader may have meant only trees damaged during the preceding night, he did not state that. Grievant, not unreasonably, believed that clearing trees damaged during an earlier storm fell within the instruction he received. The general consensus is that grievant was not provided with sufficient supervision. Even the resident engineer stated that, "The designated supervisor on the day of the incident, February 5, 2002, did not provide adequate supervision."[17] Therefore, it must be concluded that grievant did not fail to follow his supervisor's instructions but rather, followed them to the best of his understanding.

The second offense cited in the written notice is failure to comply with established written policy. As noted above, the evidence demonstrates that grievant's actions did violate two provisions of the agency's written policies. However, in order to have an offense, it must be demonstrated that grievant had knowledge and understanding of the policies. The preponderance of evidence in this case reflects that grievant had not seen the policies, had not received any

copy of the March 2001 policy to every employee, however grievant testified in an equally credible manner that he had not received the policy. Grievant's crew leader testified that he had not seen either policy prior to February 2002. More significantly, grievant's supervisor testified that he received the March 2002 policy only after the August 2002 incident but that he did not give the policy to his employees. An employee cannot be held accountable for violating a policy that the supervisor fails both to distribute to all employees and to provide training on.

Even if the agency could demonstrate that grievant knowingly committed this offense, there are significant mitigating circumstances that would require rescission of the disciplinary action. Three witnesses for grievant freely testified that they had cut trees off the right-of-way, and had seen almost every employee including supervisors cut trees off the right-of-way. No other employee has ever been disciplined for this offense. The agency did not rebut any of the testimony on this point proffered by grievant and his witnesses.

Grievant seeks three forms of relief: removal of the disciplinary action, cessation of harassment by his supervisor, and an apology from his supervisor. The evidence of harassment in this case was spotty and anecdotal. Nonetheless, the agency did not rebut the testimony about alleged harassment. The hearing officer's authority is limited to ordering the agency to comply with applicable law and policy. In view of the evidence, the hearing officer recommends that the agency review the behavior of grievant's supervisor and take whatever steps are necessary to assure that the agency is in compliance with the law and policy. Hearing Officers do not have the authority to order one person to apologize to another.[18]

During the second-step resolution process, the agency offered to reduce the discipline to a Group I Written Notice because 1) grievant's supervisor failed to provide adequate supervision and, 2) grievant had not been effectively counseled in the past. During the hearing, the agency reiterated that its offer to reduce the discipline still stands. Moreover, the resident engineer acknowledged that if grievant had shown remorse, he would have given only a written counseling. Nonetheless, the agency contends that grievant knew he was off the right-of-way and that his instructions were beyond the scope of his instructions.

According to the agency's witness (grievant's supervisor), the grievant did offer to apologize to the property owner. Given that grievant was unaware that his actions violated policy, his offer to apologize is indicative of a reasonable level of remorse. Further, the evidence is insufficient to conclude that grievant knew he was off the right-of-way. However, even if he did know, he believed he was cleaning up storm damage, some of which appears to have been on the edge of the right-of-way. Given all the circumstances, including the lack of discipline to other employees in similar cases, the only apparent difference here is that a very vocal property owner is complaining. Discipline should be meted

[18] § 5.9, *Grievance Procedure Manual*, effective July 1, 2001.

out evenly to all who violate policy, not just to those about whom a citizen complains. Accordingly, it is concluded that disciplinary action is not warranted in this case. The appropriate corrective action is verbal counseling, which should be documented in writing.

DECISION

The disciplinary action of the agency is reversed.

The Group II Written Notice issued to grievant on February 19, 2002 is hereby VACATED. The agency shall instead verbally counsel grievant and document the details of the counseling session in writing.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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.[19]

[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]

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David J. Latham, Esq.
Hearing Officer

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