

Issue: Group II Written Notice with 5-day suspension (failure to follow supervisor's instruction); Hearing Date: 07/24/02; Decision Date: 07/26/02; Agency: Department of Transportation; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5476



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5476

Hearing Date: July 24, 2002
Decision Issued: July 26, 2002

PROCEDURAL HISTORY

On April 18, 2002, Grievant was issued a Group II Written Notice of disciplinary action with five workdays suspension for:

Failure To Follow A Supervisors Instructions: On April 3, 2002, you were instructed to leave an accident scene in the Eastbound Tunnel by your supervisor. You refused to leave the scene.

On May 17, 2002, 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 June 19, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 24, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Legal Assistant Advocate
Two Transportation Operator II:

ISSUE

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

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 Transportation Operator II. The purpose of his position is to “[respond] to calls from supervision to assist the public with disabled vehicles, accidents or breakdowns as requested.”¹ One of Grievant’s duties includes towing:

Perform towing and recovery of all disabled, wrecked, abandoned vehicles on the ... Tunnel facility as required and assist motorists.

Grievant has been working for the Agency for at least six years with satisfactory performance evaluations. Grievant received a Group II Written Notice on February 27, 2001 for failure to follow supervisor’s instructions and disruptive behavior.

On April 3, 2002, a multi-vehicle accident occurred inside a tunnel maintained by the Agency. Grievant, his Supervisor, and several other employees arrived at the scene of the accident. Grievant began directing traffic away from the damaged vehicles. One of the damaged vehicles was a Jeep with an airbag that deployed during the collision. It had front-end damage. A tow truck arrived near the accident. The Supervisor wanted to have the damaged Jeep towed out of the tunnel. Towing is the most common method of removing vehicles from tunnels. Grievant believed that the damage to the Jeep was slight and that the Jeep could be driven out of the tunnel. Grievant told the Supervisor that the Jeep should be driven out rather than being towed. The Supervisor responded that the vehicle would be towed and that Grievant should do as the Supervisor instructed. Grievant started pointing his finger in the same manner as the Supervisor had been pointing his finger, so the Supervisor said “That’s it. Get out.”

¹ Agency Exhibit 1.

Grievant refused to leave. Instead he went to the Jeep, removed a knife from his pocket and cut out the airbag. He then turned the ignition key to the position enabling him to put the vehicle in neutral gear. He rolled the vehicle behind the waiting tow truck so that it could be towed. No one had authorized Grievant to roll the vehicle or remove the airbag. He removed the airbag so that the vehicle could be steered.

CONCLUSIONS OF LAW AND POLICY

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).² 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 follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense. P&PM § 1.60(V)(B)(2)(a). Grievant’s supervisor clearly indicated that the vehicle would be towed without first being moved. Grievant moved the vehicle. The Supervisor instructed Grievant to leave the tunnel, yet he remained and removed the vehicle airbag without authorization from the vehicle owner or the Supervisor. The Group II Written Notice must be upheld.

Accumulation of a second active Group II Written Notice “normally should result in discharge.”³ Including this disciplinary action, Grievant has two active Written Notices. The Agency mitigated the disciplinary action to a five workday suspension. The Hearing Officer believes no additional mitigation is warranted.

Grievant contends that the Supervisor’s decision to tow the vehicle was incorrect since the vehicle could be driven. If the Supervisor had only listened to Grievant before making a premature decision, the Supervisor would have realized the merit of Grievant’s suggestion, according to Grievant. This argument is untenable. Even if Grievant’s opinion represented the preferred solution, this would not excuse his obligation to comply with his supervisor’s instructions.

When a supervisor gives an instruction to a subordinate, it is not necessary that the instruction be the best management decision possible before the subordinate must comply with the instruction. As long as the supervisor’s instruction is lawful, ethical, and

² The Department of Human Resource Management has issued its *Policies and Procedures Manual* (P&PM) setting forth Standards of Conduct for State employees.

³ P&PM § 1.60(VII)(D)(2)(b).

in accordance with the agency's policy, a subordinate must comply with that instruction or risk receiving disciplinary action.

The Agency has presented sufficient evidence to the Supervisor's decision was appropriate under the circumstances and in accordance with Agency policy. Grievant clearly desired to see the matter resolved in an efficient and practical manner; however, once the Supervisor made the decision and gave Grievant instructions, Grievant should have complied with those instructions.

DECISION

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

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