

Issue: Group II Written Notice (failure to follow supervisor's instructions, perform assigned work, or otherwise comply with established written policy); Hearing Date: August 1, 2002; Decision Date: September 5, 2002; Agency: Virginia Department of Transportation; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5486



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5486**

Hearing Date: August 1, 2002  
Decision Issued: September 5, 2002

**PROCEDURAL HISTORY**

On March 7, 2002, Grievant was issued a Group II Written Notice of disciplinary action for:

*Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy, specifically, Employee Work Profile, PART II – work Description & Performance Plan – 16. Purpose of Position; 17. KSA's and/or Competencies; 19.B – PROJECT CONTROL, C. TECHNICAL SUPPORT and D. Information Processing.*

On April 4, 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 she requested a hearing. On July 8, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 1, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Representative

Assistant Resident Engineer  
Environmental Engineer  
Transportation Construction Inspector  
Construction Inspector 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:

Federal regulations require the Virginia Department of Transportation to ensure that projects involving Federal money "are completed in conformance with approved plans and specifications."<sup>1</sup> To meet this obligation, the Agency employs inspectors to monitor all aspects of construction projects. An inspector has the authority<sup>2</sup> to shut down a project if the contractor is not complying with all laws and regulations including those requiring the contractor to obtain certain government permits before beginning a particular phase of construction.

The Agency employs Grievant as a Transportation Construction Inspector, Senior. She reports to the Project Engineer who reports to the Assistant Resident Engineer. The Resident Engineer oversees the Residency. On August 27, 2001, Grievant received a Group I Written Notice for inadequate job performance and a Group II Written Notice for failure to perform assigned work and comply with established written policies.<sup>3</sup>

---

<sup>1</sup> 23 CFR § 635.105.

<sup>2</sup> The authority to stop a construction projects originates with the Resident Engineer who often delegates that authority to construction inspectors.

<sup>3</sup> Agency Exhibit D.

Grievant's position responsibilities are described in her Employee Work Profile. This document is reviewed by Grievant and her supervisor at the beginning of the performance cycle and it serves as the foundation upon which to measure Grievant's job performance during the following approximately 12 months.

The purpose of Grievant's position<sup>4</sup> is to:

Coordinate, monitor, and inspect all contractor project activities on the most complex projects in a transportation district. Work involves supervising, assigning and directing the work of subordinate technical personnel engaged in a significant construction inspection project and performing the more complex construction inspection tasks. Work includes providing technical supervision to construction inspectors assigned to project sites. Considerable independence and judgment is exercised in planning and carrying out assignments under the supervision of an engineer. Reviews and approves the work of other inspectors assigned to the project, and is accountable for ensuring total contract compliance, project documentation, safety, quality control, and protecting of the environment through identification of needed and required environmental control devices. Typically, the most complex projects involve major roadway, bridge, tunnel, and drainage structures. Complexity may also be affected by the geographical location, proximity to an urban area, sensitive environmental considerations, traffic volume, and coordination with local governments and municipalities.

In order to properly perform<sup>5</sup> her duties, Grievant is expected to be able to:

Provide work direction to others in the activities of a large construction project; to communicate effectively, both orally and in writing; to review and evaluate construction materials, tests, and reports for contract and industry compliance; to read and interpret engineering plans and specifications and to recognize deviations from such plans in the construction process, to make technical inspections and to enforce regulations firmly, tactfully, and impartially.

One of Grievant's Core Responsibilities<sup>6</sup> is Project Control. She must oversee:

all phases of multi-operational roadway and structural construction project to ensure all work is performed in accordance with project plans, specifications, and special provisions by participating in pre-construction conferences with contractors; reviewing contractors' work in progress;

---

<sup>4</sup> Agency Exhibit A, page 6.

<sup>5</sup> Agency Exhibit A, page 7.

<sup>6</sup> Agency Exhibit A, page 8.

reviewing supplemental agreements and change orders, reviewing pay quantities for partial and final payment; and completing required records and reports during the life of the project.

During a road construction project, a contractor may find that the construction site lacks sufficient dirt or other natural resources to complete the project. If the contractor must obtain these resources from another location that location is referred to as a "borrow site." For example, a contractor may borrow dirt from the off site location and bring it to the construction site. If the size of the borrow site exceeds five acres, then the contractor must obtain a Virginia Pollution Discharge Elimination System (VPDES) permit from the Virginia Department of Environmental Quality (DEQ).

On January 4, 2001, a Project Showing was held for the construction project. Requirements for VPDES permits were discussed during this meeting. Grievant attended the meeting.

On January 23, 2001, the Contractor submitted a proposal to the Agency for a roadway construction project. The Agency accepted the proposal on March 8, 2001. One of the requirements of the contract addresses when the Contractor is required to obtain a VPDES permit. Section 107C(l) of the contract states:

The Contractor will be responsible for acquiring the VDPES permit for any support facilities, construction materials or equipment storage areas, and other industrial storm water discharge directly related to the construction process.

On March 15, 2001, a Preconstruction Conference was held at the Agency Residency. During this conference the Environmental Specialist distributed a handout with environmental requirements for the project to Grievant. This handout stated the Contractor was obligated to obtain a VPDES permit for any off-site support activities or facilities, if the support activity involved greater than five acres in size.<sup>7</sup>

On May 22, 2001, the Agency's Project Engineer approved the Contractor's intended borrow site with certain stipulations. One of those stipulations<sup>8</sup> stated:

Since this off site construction activity disturbs greater than five acres, a Virginia Pollutant Discharge Elimination System (VPDES) permit must be obtained by the contractor. Please coordinate with the Virginia Department of Environmental Quality (DEQ) for the acquisition of this permit and compliance with its terms.

---

<sup>7</sup> Agency Exhibit A, page 42.

<sup>8</sup> Agency Exhibit A, page 48.

Although the Contractor indicated<sup>9</sup> it would seek a VPDES permit once the borrow site was approved, it failed to do so and began using the borrow site without all of the necessary permits.

Grievant maintains the official project documentation for the Agency at the Agency's field office. If the Contractor had timely obtained the VPDES permit, a copy of the permit would have been located within files subject to Grievant's review.

The Agency has developed a Construction Quality Project Report Improvement Program (CQIP) to provide an independent review of how well the contractor is performing under the contract. The CQIP report also serves as one basis to determine how well Agency inspectors are monitoring the construction project. On February 20, 2002, a CQIP review began for the construction project. The report issued on February 26, 2002 concludes:

The major concern on this project was the Contractor failed to obtain the proper permit prior to opening of the borrow area. Work was stopped in this area upon discovery of this violation. Contractor immediately submitted documentation to obtain permit with DEQ.

The Contractor's Vice President explained his company's failure to obtain the VPDES permit as follows:

Once the borrow pit plan was approved, a VPDES permit was required, one which I had not heard of or have never filled out before. I received the forms and filled them out but for some reason I failed to mail them to the Department of Environmental Quality. \*\*\* When it was realized that the VPDES permit has not been submitted to DEQ, I [called] them and talked to [Water Permit Manager] and [Environmental Engineer, Senior]. They assured me that there would be no violation since VDOT had already approved the borrow pit plan and all the environmental requirements were in place. All I needed to do was fill out the proper forms and send the registration fee and they would review the forms and send me the VPDES permit.<sup>10</sup>

Other than failing to verify that the Contractor timely obtained the VPDES permit, Grievant's performance on the construction project was good.

## **CONCLUSIONS OF LAW AND POLICY**

---

<sup>9</sup> Agency Exhibit A, page 50.

<sup>10</sup> Grievant Exhibit 4.

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.” DHRM § 1.60(V)(B).<sup>11</sup> 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.” DHRM § 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.” DHRM § 1.60(V)(B)(3).

“Failure to ... perform assigned work, or otherwise comply with established written policy” is a Group II offense. DHRM § 1.60(V)(B)(2)(a). Grievant was assigned responsibility for monitoring the “total construction process” of a construction project. Part of her duties included reviewing documentation to determine whether the Contractor had obtained necessary permits. By failing to review documentation to determine that the Contractor had not obtained a VPDES permit, Grievant failed to perform her assigned work thereby justifying issuance of a Group II Written Notice.

A Transportation Construction Inspector serves as the “eyes and ears” of the Agency at the construction site. Grievant was given a great deal of independence and control over monitoring the construction project. Grievant should have noticed that the VPDES permit was a requirement for the borrow site and that the Contractor had not obtained the permit.

Grievant contends she should have been told of the new requirement and that she would be required to verify that the Contractor obtained the permit. Grievant was informed of the requirement for the VPDES permit. In order to accomplish her job, she must verify that contractors have obtained permits. The VPDES permit may have been new to her, but the function of verifying permits was not. Grievant should have realized it was her responsibility to ensure that the Contractor had obtained the VPDES permit.

Grievant contends that the Environmental Specialist was the person responsible for making sure that the Contractor obtained the VPDES permit. This argument is untenable because of the nature of the Environmental Specialist's duties and his position within the Agency's organizational structure. The Environmental Specialist is responsible for monitoring the environmental standards for numerous construction projects. He is not within the chain of command under the Resident Engineer supervising Grievant. Even if the Environmental Specialist had the duty to monitor VPDES permit compliance, his failure to do so would not have relieved Grievant of her responsibility to monitor contractor compliance.

Grievant argues that once use of the borrow site had been approved by the Project Engineer, she had reason to assume that all conditions were met including the VPDES requirements. The approval issued by the Project Engineer, however, shows it

---

<sup>11</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

contains a condition that the Contractor first obtain a VPDES permit. Thus, Grievant should not have assumed that approval by the Project Engineer was an unconditional approval no longer requiring her attention.

Whether an Agency disciplines its employees consistently is an important consideration in grievance hearings. Grievant contends the Agency disciplined her more harshly than other employees. The Agency presented examples of disciplinary action taken against other employees in the Residency. That discipline ranged from written counseling memorandums to a Group II Written Notice. Given that each case must be evaluated separately based on an employee's duties, performance, length of service, and other factors, the Hearing Officer cannot conclude that Grievant's discipline is inconsistent with disciplinary action taken against other employees.

There is no question that Grievant's position requires her to possess a significant level of knowledge regarding principles of engineering and construction as well as have the ability to track and understand numerous details. Although it is not surprising an employee working in a difficult job may make mistakes, the Agency has met its burden of proof to support its disciplinary action.

## 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:

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