

Issue: Group III Written Notice with termination (violation of safety rules); Hearing Date: 10/28/02; Decision Date: 10/29/02; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5556



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5556

Hearing Date: October 28, 2002
Decision Issued: October 29, 2002

PROCEDURAL HISTORY

On June 17, 2002, Grievant was issued a Group III Written Notice of disciplinary action with removal for:

Violating safety rules where there is a threat of bodily harm.

On July 1, 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 September 26, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 28, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Agency Party Designee
Agency Representative
Transportation Operations Manager
Transportation Operator II
Transportation Operation Manager II

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with removal.

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 employed Grievant as a Transportation Operator II until his removal on June 17, 2002. He received a Group II Written Notice on November 9, 1999 for failing to wear protective equipment while removing a tree. Grievant did not appear at the hearing to present any evidence.

On May 10, 2002, Grievant was using a tar kettle to spray tar between new and old asphalt under repair. The sprayer stopped working and Grievant wanted to remove the nozzle to unclog the sprayer. Grievant's supervisor instructed him several times not to remove the nozzle and to use another tar kettle. Once Grievant's supervisor turned away from Grievant, Grievant removed the nozzle. Hot tar sprayed all over Grievant, including his face and eyes. Grievant was not seriously injured, but was taken to the hospital for evaluation.

Grievant was not wearing eye protection when the accident happened. The Agency had issued eye goggles to Grievant. He had repeatedly been instructed by his supervisors and others to wear eye protection when operating the tar kettle. Grievant signed a statement acknowledging his obligation to wear eye protection equipment where his sight may be in jeopardy.

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.” DHRM § 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.” 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).

“Violating safety rules where there is a threat of physical harm” is a Group III offense.² The Agency’s safety rules require that “adequate eye protection shall be worn ... when working in situations where the sight may be in jeopardy.”³ Grievant knew or should have known that the Agency required him to wear eye protection when operating or handling the tar kettle sprayer. Grievant violated a safety rule where there was a threat of physical harm to his eyes. Grievant’s behavior rises to the level of a Group III offense.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

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.

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

² DHRM § V(B)(3)(g).

³ Agency Exhibit 2.

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.⁴

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.