

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow supervisor's instructions and perform assigned work); Hearing Date: 08/04/03; Decision Issued: 08/13/03; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 5774; **Judicial Review: Appealed to the Circuit Court in Fairfax County on 09/12/03; Outcome: Decision of HO is not contradictory to law [Law No. 217110] (10/10/03).** **Administrative Review: Hearing Officer Reconsideration Request received 12/19/03; Reconsideration Decision date: 12/22/03; Outcome: Request untimely.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5774

Hearing Date: August 4, 2003
Decision Issued: August 13, 2003

PROCEDURAL HISTORY

On April 22, 2003, Grievant was issued a Group II Written Notice of disciplinary action with removal for:

[Grievant] failed to perform the work for which he was responsible as Project Administrator and failed to follow the instructions provided to him for his work assignments on Rte. 123 widening project.

On April 25, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 15, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 4, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel

Four witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal for failure to follow a supervisor's instruction.

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 Right of Way and Utilities Project Administrator until his removal on April 22, 2003. The purpose of his position was:

Responsible for the management of the right of way and utilities portion of complex projects ensuring quality, timeliness and budget considerations of complex right of way and utilities projects and work as a team member and other preliminary engineering disciplines. Provide right of way and utilities leadership and direction to team members; ensure the integrity of project information in systems and analyze/compile information in response to inquiries from the local/state/federal government and the public. Performs complex work assignments in one or more of the various functional areas.¹

Project Coordination was one of Grievant's Core Responsibilities and required approximately 55% of his time. Project Coordination consisted of:

Uses independent judgment to function as a vital member of a preliminary engineering development team(s) by managing the R/W/U² portion of

¹ Grievant Exhibit 28.

² Right of way utilities section.

projects & working in partnership with all PE³ Disciplines to develop high-quality plans. Providing/analyzing information to assist in project design, developing cost analysis & by making funding recommendations for R/W/U. Manages all R/W/U portions of the project from project conception to completion. Assesses/identifies/arranges appropriate resources for R/W/U team creation. Provides leadership in the PE & R/W/U Teams through decision-making process to arrive at conclusive, constructive team decisions. Responsibility for R/W/U portion of the project allocation to ensure it stays within designated funds. Monitor expenditures, identifies/determines additional/surplus monies & funding requirements. Justify/prepare requests to change the allocation. Evaluate work of consultants to ensure quality/timeliness of work. Liaison with consultants & CO by monitoring contract & keeping them abreast of problems/concerns.

Grievant came to the United States from Iran in 1976. He began working for VDOT in 1987 and became a U.S. Citizen in 1988. He earned a Bachelors and a Masters degree.

Grievant filed a complaint with the DHRM Office of Equal Employment Services in March 2001 alleging VDOT discriminated against him because of his race and national origin. Grievant's position was upgraded to an Engineering Technician VII with a 10% salary increase retroactive to December 25, 2000. In April 2001, Grievant informed the Office that he had accepted VDOT's resolutions and that his concerns had been resolved.⁴ Grievant's complaint was closed on May 15, 2001.⁵ On May 15, 2001, Grievant received a Group II Written Notice for failure to follow a supervisor's instructions.⁶ On February 28 2002, Grievant received a Group II Written Notice with a 30 workday suspension for failure to follow a supervisor's instructions.⁷

VDOT was involved in the widening of a highly traveled county road. As part of the widening project, it was necessary to relocate utilities passing under an access road within the control of a county water authority and a private company called Vulcan. One aspect of the widening project required moving the location of an entrance used by Vulcan.

³ Professional Engineer.

⁴ The Manager did not agree with promoting Grievant.

⁵ Grievant Exhibit 3.

⁶ Grievant Exhibits 4. Grievant initially challenged the disciplinary action, but it was not overturned. Consequently, Grievant is bound by the Written Notice regardless of its merits.

⁷ Grievant Exhibit 18.

On August 30, 2002, the Consultant⁸ sent Mr. TV⁹ an email regarding a proposed road that would pass through the County Water Authority's Water Treatment Plant. The email stated:

As you may recall, [Consultant] identified three (3) Private water mains, as well as some electrical and telephone lines, that will be in (subgrade) conflict with the new road. *** in addition to the private utilities, we recently were made aware (by the Water Authority's GWTP consultant) of two other potential conflicts on the treatment plant site that will be impacted by the proposed Vulcan access road. First, there is an existing fiber optic cable located adjacent to the existing 300mm (12-inch) water main that must be relocated (offset) under the proposed Vulcan access road Secondly, we have been advised that the new (less than two years old) 900mm (36-inch) "High Service Connect to Main Service" water main ... also is in conflict with the proposed Vulcan access road. It is our understanding that both of these lines, as well as the 300mm water main, were installed at their current depths based on designed cross-sections provided by VDOT about two years ago. Apparently, VDOT's recent redesign of the Vulcan access road, at a lower grade than designed originally, has resulted in these conflicts.

Mr. TV sent a copy of the Consultant's email to the Manager and stated:

Enclosed are some concerns from [Consultant] in regard to utilities on this project. Have these been addressed in the right-of-way negotiations. I just want to make sure that all utility conflicts are taking care of before we get to [advertisement]. Can you please let [Consultant] know of your findings.

On September 4, 2002, the Manager forwarded to Grievant a copy of Mr. TV's email containing the Consultant's comments and told Grievant to, "Check into these questions and concerns and make sure we are covered." An hour later Grievant replied to the Manager:

The concerns are not really clear that exactly what conflicts they are talking about. If related to [County Water Authority's] water treatment plants I did not have any comments at this, because that one is a private project. If related to water facilities within our project limits utility companies or their representatives need coordinate their relocation plans with each other. If any names or phone numbers [are needed] will be more than happy to provide it.

⁸ The Consultant was not a VDOT employee.

⁹ Mr. TV worked for the Agency's In-Plan section in Richmond.

The Manager responded to Grievant's email by stating:

Please contact [Consultant] and obtain more input if needed with regard to the private services, fiber optics, electrical, telephone, Etc., and find out if the grade is going to cause a problem. If it is not on the VDOT project then we cannot deal with it, but if it is within our [right-of-way] we need to know if the negotiator took care of or even is aware of these issues.

In response to the Manager's email, Grievant called the Consultant for information. On September 11, 2002, the Consultant sent Grievant a fax with two drawings attached and message stating:

Per our telephone conversation earlier today, attached is a copy of the portion of the proposed Vulcan Materials Access Road Plan, located adjacent to the ... County Water Authority's ... Water Treatment Plat, that are in conflict with some existing private utilities serving Vulcan materials and APAC. Also attached is a copy of the same segment of the proposed access road where it ties to the existing entrance road to Vulcan, as shown on VDOT Plant Sheet 7D. Please call me to discuss this matter further. You can also reach me on my cell phone at [number].

Grievant printed a copy of the series of emails between Grievant and the Manager and wrote, in his handwriting, a note to the Manager stating:

[Manager], we discussed earlier I contacted [Mr. TV] (In-plan section) and [Consultant] concerning the private utilities. I was advised by [Mr. TV] that all private utilities should be handled by negotiation section.¹⁰ [Regional Right of Way] as part of negotiation of the property. And as soon as I get the information from [Consultant], I will take appropriate action.

Grievant's handwritten note was not dated.¹¹

On March 7, 2003, the County Water Authority notified VDOT that several utilities on the Rte. 123 widening project were not relocated. The project had already been advertised for construction bids on December 2002 and was soon to be awarded to a contractor.

Private utilities are usually the responsibility of the landowner to move if necessary. If a private utility must be moved for the convenience¹² of VDOT, however,

¹⁰ Mr. SS is part of the negotiation section and not part of the right of way section where Grievant worked.

¹¹ Grievant contends he placed the email containing his handwritten note in the Manager's inbox, but the Manager denies ever having received the document.

then VDOT will pay for the cost of relocating otherwise private utilities. Public utilities¹³ are the responsibility of VDOT. VDOT pays for the cost of relocating public utilities.

Relocating the Vulcan assess road and related construction required relocation of some public utilities and of some private utilities being moved for the convenience of VDOT. Consequently, VDOT was responsible for ensuring relocation plans were drawn and implemented.

CONCLUSIONS OF 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).¹⁴ 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).

VDOT contends Grievant failed to follow a supervisor’s instructions thereby justifying issuance of a Group II Written Notice. Grievant attempted to comply with the supervisor’s instruction by contacting the Consultants and obtaining necessary information about the utilities. The remaining part of the Manager’s instruction was, in essence, that Grievant should do his job. Failing to exercise the necessary discretion to complete one’s job is inadequate job performance and is not the failure to follow a specific instruction..

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties.

¹² For example, moving a commercial sprinkler system on private property to another location would not be necessarily paid by VDOT. If VDOT needs the system to be moved in order to benefit VDOT, however, then VDOT would pay for the cost of the relocation.

¹³ Va. Code § 56-232(A) states, “The term “public utility” as used in §§ 56-233 to 56-240 and 56-246 to 56-250: 1. Shall mean and embrace every corporation (other than a municipality), company, individual, or association of individuals or cooperative, their lessees, trustees, or receivers, appointed by any court whatsoever, that now or hereafter may own, manage or control any plant or equipment or any part of a plant or equipment within the Commonwealth for the conveyance of telephone messages or for the production, transmission, delivery, or furnishing of heat, chilled air, chilled water, light, power, or water, or sewerage facilities, either directly or indirectly, to or for the public.”

¹⁴ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

In order for Grievant to respond to the Manager's email and act as a Project Administrator, Grievant was responsible for (1) sorting out what utilities represented VDOT obligations, (2) making sure that the appropriate VDOT staff were aware of the required relocation work, (3) making sure that the appropriate VDOT staff took the necessary actions to begin relocation, (4) monitoring whether the appropriate VDOT staff had taken steps to ensure relocation of the utilities, and (5) informing the Manager of the status of the project including the activities of other VDOT staff.

Although Grievant collected some initial information about the Manager's concerns, Grievant's failed to follow through with all of his responsibilities. In particular, the Manager wrote Grievant "we need to know if the negotiator took care of or even is aware of these issues." In Grievant's handwritten note, he states that private utilities should be handled by the negotiation section. Grievant did not later inform the Manager that the negotiator actually had begun handling the relocation or that the negotiator had completed his work regarding the relocation. Grievant failed to update any initial contact he may have had with the negotiator. The Manager clearly expected more than an initial contact with the negotiator and the Consultant; the Manager wanted information sufficient to "make sure we are covered." As a Project Administrator, Grievant was expected to demonstrate "independent judgment" and "leadership/influence on others".¹⁵ He failed to do so thereby justify issuance of a Group I Written Notice.¹⁶

Grievant already has two active Group II Written Notices. Group II Written Notices are cumulative. A second active Group II Written Notice normally should result in removal.¹⁷ Although the disciplinary action against Grievant in this case is reduced to a Group I Written Notice, Grievant has accumulated a sufficient number of active disciplinary actions to uphold removal.

Grievant contends that the notes he wrote on a printout the email from the Manager shows that he complied with the Manager's instructions. Although it is unclear when Grievant drafted his notes and whether he presented¹⁸ those notes to the Manager, if the Hearing Officer assumes for the sake of argument that Grievant timely presented the notes to the Manager, the outcome of this case does not change. Although Grievant's note suggests other people would be responsible for the utility relocation, as Project Administrator Grievant remained responsible for following up to

¹⁵ Grievant Exhibit 34. Measures for Core Responsibilities.

¹⁶ In Grievant's handwritten response to the Manager, Grievant states, "as soon as I get the information from [Consultant], I will take appropriate action." Grievant did not take appropriate action after he obtained information from the Consultant.

¹⁷ DHRM § 1.60(VII)(D)(2)(b).

¹⁸ Because of the ongoing conflict between Grievant and the Manager, Grievant's practice was to document in writing his interactions with the Manager. Sending a reply email would have served to fully document Grievant's response to the Manager because a reply email would show the date sent and received. Grievant's handwritten note does not show a date or establish that the Manager received it.

make sure others had finished their assumed duties and that the Manager was informed of the status of the utility relocation.

Grievant contends the Agency's disciplinary action raises from improper retaliation against him. No credible evidence was presented suggesting the Agency disciplined Grievant for any impermissible reason.

DECISION

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

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

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

[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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5774-R

Issued: December 22, 2003

DECISION

On December 19, 2003, Grievant, by Counsel, filed a request for reconsideration of the hearing decision issued August 13, 2003. *Grievant Procedure Manual* section 7.2 requires administrative review of a hearing decision to be received by the administrative reviewer within 10 calendar days of the date of the original hearing decision. Since more than 10 calendar days has passed since the date the hearing decision was issued, the Hearing Officer lacks jurisdiction to consider Grievant's request for reconsideration. For this reason, Grievant's request for reconsideration is **denied**.

Carl Wilson Schmidt, Esq.
Hearing Officer