

Issue: Group I Written Notice (unsatisfactory work performance); Hearing Date:
08/25/03; Decision Issued: 09/04/03; Agency: Dept. of Forestry; AHO: Carl Wilson
Schmidt, Esq.; Case No. 5784



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5784

Hearing Date: August 25, 2003
Decision Issued: September 4, 2003

PROCEDURAL HISTORY

On February 18, 2003, Grievant was issued a Group I Written Notice of disciplinary action for:

Employee has been counseled in the past for failure to follow procedures and paperwork concerning the Water Quality Law and Logging Inspections. The tract in question concerning this offense was inspected by the employee on the date listed. Both the Reserve Forester and Water Quality Engineer inspected the tract within five days and found noncompliance issues that were not identified on the employee's inspection. Counseling has been both verbal and in writing.

On March 18, 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 August 4, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 25, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Four witnesses

ISSUE

Whether Grievant should receive a Group I Written Notice of disciplinary action for inadequate or unsatisfactory work performance.

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 Forestry employs Grievant as a Natural Resources Specialist II which is also known as a Forest Tech. He has been employed by the Agency since October 16, 1978.

The purpose of Grievant’s position is:

A field service paraprofessional position that servers at the multi—County/team level providing the following daily activities under the guidance of the [Regional] Forester; Forest protection in accordance with the DOF fire readiness plan, the use of heavy equipment in fire suppression, enforcing Virginia’s Forest Fire Law, inspection of harvest operations, enforcement of Virginia’s Water Quality Law, enforcement of Seed Tree Law assistance, and on the ground support of reforestation projects, education, forest health, and forest management.¹

¹ Agency Exhibit 4.

One of Grievant's core responsibilities is to conduct harvest inspections in order to enforce the State's water quality law.² Grievant is expected to conduct inspections and submit necessary paperwork.

In parts of the State where lumber is plentiful, logging companies will enter into contracts with landowners to harvest the timber on their lands. If the land has streams passing through it, harvesting timber may cause sediment to seep into the streams thereby causing a water quality law violation. Grievant and other DOF staff visit logging sites to perform inspections designed to reveal whether logging companies are jeopardizing water quality. Under DOF policy³, an inspector must complete a Harvest Inspection form each time he or she conducts an inspection. This form describes six categories of potential water quality problems for the inspector to examine. These categories are: (1) haul roads, (2) skid trails, (3) improper SMZ, (4) landings, (5) stream crossings, and (6) other(specify). Each of these categories are types of activities that may be found at the typical timber harvesting operation. For example, a haul road typically connects the logging site to a public road. A haul road is often built of dirt and/or gravel. If a haul road is near a stream and the road is heavily traveled by large trucks, water quality problems can occur. Skid trails are used to drag logs from where they are cut in the woods to a landing where the logs are kept until they can be transported out of the logging site. Dragging logs through a forest and near streams may result in water quality concerns.

If the inspector observes a water quality concern, the inspector issues a Form 143 outlining water quality protection recommendations. The logging company is obligated to eliminate the water quality concerns and may eliminate those concerns using the inspector's recommendations or use other methods selected by the company.

On October 22, 2002, Grievant inspected track number 02019. Grievant observed that the logging company had begun harvesting timber in the southern portion of a tract divided by a long stream. The logging company intended to continue work in the southern part of the tract and begin work in the northern portion several months later. Grievant concluded that there were water quality concerns for five of the six categories in the southern part of the tract. He issued a Form 143 outlining his recommendations to alleviate the water quality concerns. On November 12, 2002, Grievant inspected the tract again and concluded that all of the water quality concerns outlined in the Form 143 had been eliminated. On December 10, 2002, Mr. B. L., a Forest Tech, inspected tract 02019 and concluded that there were no water quality concerns. He did not issued a Form 143. The logging company had not yet begun cutting trees in the northern side of the tract above the stream.

² Grievant has the knowledge to properly inspect logging sites for water quality concerns. He was one of approximately 30 students taking a training course focusing on water quality. He received the highest score in the class.

³ The Agency implemented its Water Quality policy in 1998 and updated it on August 1, 2002. See Agency Exhibit 2.

On January 27, 2003, Grievant inspected the tract and found no water quality concerns. After he completed the inspection report he sent it through the appropriate Agency channels for review and data collection. The Water Quality Engineer reviewed Grievant's inspection report and became concerned that Grievant may have missed some problems at the site. Because of the nature of the logging activity taking place on the tract and the topographical problems with the site, the Water Quality Engineer believed it was unlikely that the site would not have water quality problems. Nine days later, on February 5, 2003, he and Grievant's Supervisor visited the tract and observed several water quality problems in the northern portion of the tract. They concluded that Grievant had not properly inspected the tract on January 27, 2003.

On February 14, 2003, Grievant learned that the Agency believed he had not properly inspected the tract on January 27, 2003. He went to the tract and found water quality concerns for haul roads, skip trails, improper SMZ, and stream crossings. He issued a Form 143 on February 18, 2003.

Logging activity depends, in part, on the weather. If the weather is too cold, a logging company may suspend operations until the weather breaks. In most of January 2003, the weather in the area of the logging site included temperatures below freezing with snow accumulation on the ground. Temperatures began rising above freezing level on January 28, 2003 with the daily high temperatures remaining above freezing levels. The expected daily high temperature was 50° on February 2, 2003, 60° on February 3, 2003, 45° on February 4, 2003, and 35° on February 5, 2003.

CONCLUSIONS OF POLICY

"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. This case is very close. It must be decided based on which party carries the burden of proof.

On February 5, 2003, water quality concerns existed at the logging site. If the condition of the tract was substantially the same on January 27, 2003 when Grievant inspected it, then there is little doubt that Grievant would have failed to properly inspect the property.

The Agency has not established that on January 27, 2003 and February 5, 2003 the tract was in substantially the same condition because the Agency has not established that logging operations in the northern part of the tract began prior to January 27, 2003. The Agency does not dispute that no water quality concerns existed at the tract on December 10, 2002 when another Forest Tech inspected the site. Insufficient evidence was presented explaining what happened at the site from December 10, 2002 to January 27, 2003. It is logical to conclude that if the site was

acceptable on December 10, 2002 and the site did not change⁴ before January 27, 2003, then the site was also acceptable on January 27, 2003 when Grievant inspected it.⁵

Nine days passed between Grievant's January 27, 2003 inspection and the Agency's visit to the logging site. All of the water quality concerns observed on February 5, 2003 could have occurred when the logging company began working on the northern portion of the tract.⁶ Grievant testified that when he inspected the tract on January 27, 2003, no one from the logging company was working at the site and the equipment did not appear to have been operated recently. Logging activity can depend on the weather. As temperatures began to rise above freezing level on January 28, 2003, the snow began to melt and work could resume at the site. The logging company may have resumed activity sometime after January 28, 2003 and that resumption of work would have explained the water quality concerns that existed on February 5, 2003.

Grievant's Supervisor testified that he spoke with a logger at the site on February 5, 2003 and asked the logger if the tract was in the same condition on January 27, 2003 as it was on February 5, 2003.⁷ The logger informed the Supervisor that the condition had not changed during that time. Although hearsay testimony is admissible in grievance hearings, the evidence is insufficient for the Hearing Officer to conclude that the condition of the tract was substantially the same on January 27, 2003 as it was on nine days later. Grievant credibly testified that he did not observe any activity at the site on January 27, 2003. When weighing the testimony of a credible witness who appears at a hearing and is subject to cross examination with the unsworn hearsay statements of an unnamed person (whose knowledge base and credibility are unknown the Hearing Officer), the Hearing Officer must give greater weight to the credible witness testifying at the hearing, namely, Grievant.

⁴ The Agency argues that the Harvest Inspection reports showed the "Acres Cut To Date" and the acreage change from 85 on December 10, 2002 to 110 on January 27, 2003, thus, Grievant should have realized additional logging took place. This argument fails because the number of acres cut to date is not based on an actual measurement. It is based on conversations between the Forest Tech and the landowner and logging company. The number of acres cut represents something between an estimate and speculation.

⁵ Grievant testified that when he visited the site on January 27, 2003, it did not appear that the logging company had begun cutting on the northern side of the tract above the stream. On February 5, 2003, the Supervisor and Water Quality Engineer observed that the logging company had begun work on the northern side of the stream.

⁶ The Forest Engineer testified that the water quality violation observed on February 5, 2003 could have resulted from logging activity begun after January 27, 2003.

⁷ The Supervisor also testified that the dirt in the northern part of the tract did not appear to have been moved the day before February 5, 2003 but had been moved sometime earlier. Assuming the Supervisor's assessment is correct, there is no basis to determine on what date the dirt had been moved. For example, it is equally likely that the dirt was moved on January 26, 2003 as it is likely that the dirt was moved on January 28, 2003. Thus, the Hearing Officer cannot draw any conclusions from this portion of the Supervisor's testimony.

The Agency contends Grievant did not spend an adequate amount of time at the tract and that he only looked at a small portion of the area. The evidence showed that Grievant was not obligated to inspect the entire tract of land; he was only obligated to inspect those portions of the land where water could be found. Grievant testified that he did not observe any logging activities above the stream and, thus, he did not need to spend more time at the site. The evidence is insufficient for the Hearing Officer to conclude that Grievant should have entered the northern portion of the tract to determine if logging activity had begun.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**.

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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.