

Issue: Group II Written Notice (failure to follow Supervisor's instructions);
Hearing Date: 02/18/04; Decision Issued: 02/20/04; Agency: DOC; AHO:
David J. Latham, Esq.; Case No. 555



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 555

Hearing Date: February 18, 2004
Decision Issued: February 20, 2004

PROCEDURAL ISSUE

The second resolution step meeting was held on July 1, 2003 but the second-step respondent did not respond to grievant until December 1, 2003. The second-step respondent believed that grievant's resignation from employment on July 2, 2003 ended the grievance process and that he was not obligated to respond. In fact, the grievance process requires the second-step respondent to provide a written response to the grievant *within five workdays* of the second-step meeting.¹ Moreover, a grievant has access to the grievance procedure as long as the grievance was initiated prior to the termination of employment.² However, while the agency was clearly not in compliance with the grievance procedure, the grievant did not raise an issue of noncompliance, and thereby forfeited his right to challenge the noncompliance.³ In fact, it was the agency that belatedly resurrected the grievance and took the necessary steps to

¹ § 3.2, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

² § 2.3, *Ibid.*

³ § 6.3, *Ibid.* Party noncompliance procedures.

reactivate the process. In any case, grievant has not shown that he has been adversely affected by the five-month delay, particularly in view of the fact that grievant is no longer employed by the Commonwealth.

APPEARANCES

Grievant
One witness for Grievant
Agency Director
Advocate for Agency
Four witnesses for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely appeal from a Group II Written Notice issued for failure to follow supervisor's instructions.⁴ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁵

Virginia Correctional Enterprises (VCE) (Hereinafter referred to as "agency") employed grievant as a production supervisor for 14 years.⁶ Subsequent to the issuance of discipline and the filing of a grievance in this case, grievant resigned from employment on July 2, 2003 as the result of disagreement over an unrelated issue.⁷

Soon after grievant became employed in 1989, he was assigned to drive a tractor-trailer as needed. Grievant's work description notes that he can be assigned "Other duties as assigned."⁸ Grievant had not previously driven such a truck but taught himself to drive the vehicle during the first weeks of employment. During the busy summer season, he drove the truck as often as once per day,

⁴ Exhibit 1. Written Notice, issued June 18, 2003.

⁵ Exhibit 2. Grievance Form A, filed June 18, 2003.

⁶ VCE is a separate arm of the Department of Corrections (DOC) that utilizes inmate labor to manufacture furniture at certain DOC facilities.

⁷ Grievant and his supervisor had a disagreement regarding grievant's request to take annual leave during one week in July. Even though the supervisor permitted grievant to take the requested leave, grievant was sufficiently disgruntled about the manner in which his request was handled that he resigned.

⁸ Exhibit 6. Grievant's *Employee Work Profile Work Description*, November 1, 2001.

while during the slow winter season he drove it only once every other week. VCE manufactures furniture at a building inside the correctional compound perimeter fence. When sufficient furniture accumulated, grievant drove a tractor-trailer from just outside the fence to the manufacturing facility loading dock. After furniture was loaded in the trailer, he drove the tractor-trailer just outside the perimeter fence and parked it in a holding lot.⁹ All of the areas in which grievant drove the truck were on the correctional center's grounds; he did not drive the tractor-trailer off state property or on public highways. Grievant has been shuttling the tractor-trailer this short distance (a few hundred yards) for 14 years.

In recent years, grievant had developed a concern about his potential liability should he have a collision while driving the truck. Grievant does not have a commercial driver's license (CDL) but he knew that truck drivers driving on public highways are required to have a CDL. He was also concerned that he might be held liable in the event of a lawsuit filed by a person injured during a collision. He had asked his supervisor about these concerns but never received what he considered to be a satisfactory response.

In May 2003, grievant arranged a meeting with the agency's Deputy Director for Administration (DDA). The primary purpose of the meeting was to discuss a grievance that grievant had previously filed. However, grievant also advised the DDA during this meeting that he did not have a CDL and was being required to drive a tractor-trailer. The DDA understood grievant's complaint to mean that he was being required to drive on public highways without a CDL. Grievant did not tell the DDA that he drove the truck only on state property and never went on a public highway. The DDA assured grievant that the agency would have to comply with all applicable laws, and she directed management to assure that the agency was in compliance.¹⁰ She also directed grievant not to drive the truck on public highways.

On June 2, 2003, the shop manager routinely asked grievant to bring the tractor-trailer from the holding lot to the loading dock of the manufacturing building. Grievant refused to follow the supervisor's instructions, telling his supervisor that the DDA had told him he did not have to drive the truck. As a result of this refusal, the supervisor issued a Group II Written Notice to grievant on June 6, 2003.¹¹ By the end of the day, however, the agency rescinded that Written Notice because it had not given the grievant a due process notice. Although agency policy does not require due process in this case, the agency elected to rescind the disciplinary action.¹²

⁹ Other drivers pick up the trailers from the holding lot and drive them over public highways to the agency's central furniture distribution warehouse.

¹⁰ Exhibit 9. Letter to grievant from DDA, May 7, 2003.

¹¹ Exhibit 11. Written Notice to grievant, June 6, 2003.

¹² Exhibit 7. Section 5-10.14.A, Procedure Number 5-10, *Standards of Conduct*, June 15, 2002 requires that oral or written notice of the offense and a reasonable opportunity to respond be given to an employee when the disciplinary action includes demotion, transfer, suspension, or

The agency Director directed that the state police be contacted to establish whether a CDL license was required in this situation. A captain at Virginia State Police headquarters advised the agency that a CDL is not required as long as the truck is driven only on the correctional facility grounds and not on the public highways. On June 3, 2003, the agency Director issued a memorandum that verified that the agency had the authority to direct employees to move trailers in and out of the manufacturing facility, and that a CDL license was not required to move trailers onto the perimeter road of the corrections facility.¹³ Grievant received a copy of the memorandum on June 3 or 4, 2003. The Director reinforced this directive in a second memorandum issued 10 days later.¹⁴

On June 17, 2003, grievant was again directed to move the tractor-trailer and he again refused. He was then shown the Director's June 3, 2003 memorandum and given another chance to comply with the supervisor's instruction. Grievant refused and was told that he could be disciplined for refusing. When grievant continued to refuse, he was told to report the next day. The Group II Written Notice was issued to grievant on June 18, 2003.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between

removal from employment. In this case, the grievant was not demoted, transferred, suspended or removed from employment.

¹³ Exhibit 4. Memorandum from agency director, June 3, 2003.

¹⁴ Exhibit 10. Memorandum from agency director, June 13, 2003.

state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.¹⁵

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section V.B.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.¹⁶ The Department of Corrections (DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.16 of the DOC Standards of Conduct addresses Group II offenses, which are defined identically to the DHRM Standards of Conduct.¹⁷ Among the examples of Group II offenses is failure to follow a supervisor's instructions.

Grievant admits that he refused to drive the tractor-trailer after being directed by his supervisor to do so. Accordingly, the agency has demonstrated, by a preponderance of evidence, that grievant committed an offense subject to disciplinary action under the Standards of Conduct. The burden of persuasion now shifts to grievant to show mitigating circumstances, if any.

Grievant points out that he has never received formal training to drive a tractor-trailer.¹⁸ However, grievant acknowledges that he taught himself to drive the truck and has been driving it regularly for 14 years. Grievant also notes that none of his coworkers have been required to drive the truck. This is not probative because it is very common that such tasks are only assigned to those who demonstrate the ability to perform them well. Grievant had demonstrated

¹⁵ § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

¹⁶ DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

¹⁷ Exhibit 7. Procedure Number 5-10, *Standards of Conduct*, June 15, 2002.

¹⁸ However, about five or six years ago, grievant and his supervisor studied for, and took, the written portion of the CDL examination. Grievant did not raise the CDL issue again until 2003.

over 14 years that he could drive the tractor-trailer competently and safely. Thus, by the time of this incident, training was a moot issue.

Grievant argues that he had no immunity from a lawsuit if an accident should occur because he did not have a CDL. While it is understandable that grievant might have such a concern prior to June 3, 2003, the Director's memorandum of that date should have eliminated that concern. By his signature, the agency Director assumed responsibility for whatever might happen by advising grievant in writing that a CDL was not required.¹⁹ Grievant has not offered any testimony or evidence to show that a CDL is required for a state employee who drives a truck only on state property.

Grievant suggested that the first resolution step response of his supervisor had been altered on the grievance form. Grievant contends that the supervisor had written a sentence stating that "Not all supervisors are required to do this." Unfortunately, the original grievance form could not be located. The agency maintains that it sent the original to grievant; grievant states that he received only a photocopy. The supervisor avers that he wrote his response on an attachment to the grievance form.²⁰ The attachment contains essentially the same language grievant says was on the grievance form. Accordingly, this is deemed a moot issue since grievant has not shown that there is any significance to where the response was written.

Grievant argues that his job description does not specifically state that he is required to drive a truck. Job descriptions are never all-inclusive. It would be virtually impossible to list every single function that an employee might be called on to perform during the course of his employment. Job descriptions are written to address the primary functions of the job. In grievant's case, his work description noted that he could be required to perform "other duties as assigned." That phrase is designed to include occasional functions, such as driving, that are not performed on a daily basis but which are required and reasonable to the accomplishment of the primary job functions.

DECISION

The decision of the agency is hereby affirmed.

The Group II Written Notice issued on June 18, 2003 for failing to follow a supervisor's instruction is UPHELD. The disciplinary action shall remain active for the period specified in Section 5-10.19.A of the Standards of Conduct.

¹⁹ While this decision affirms the agency's decision, it does so because grievant had received sufficient written assurance from the agency director that he did not need a CDL to drive the truck on the corrections facility. However, the agency is referred to Va. Code § 46.2-341.7, which addresses driving a commercial motor vehicle in the Commonwealth, and to the case of *Lockett v. Commonwealth of Virginia*, 17 Va.App. 488, 493, 438 S.E.2d 497 (1993).

²⁰ Exhibit 2, p.6. First-step response, June 24, 2003.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

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3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.²¹ You must file a notice of appeal with the clerk of the circuit court in the

²¹ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.²²

[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]

David J. Latham, Esq.
Hearing Officer

²² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.