Issue: Group II Written Notice with demotion (failure to provide adequate supervision); Hearing Date: 03/19/04; Decision Issued: 04/16/04; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 616

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 616

Hearing Date: March 19, 2004
Decision Issued: April 16, 2004

PROCEDURAL HISTORY

On January 21, 2004, Grievant was issued a Group III Written Notice of disciplinary action with demotion for:

> *Failure to provide adequate supervision over the District Construction Engineer relative to the approval and payment of a $3.9 million work order on the … Road project number 0190-131-V01C505; Universal Project Code (UPC) 12543. The work order was not prepared in accordance with VDOT and Federal Highway Administration (FHWA) policies and guidelines (Control of Contract Expenditures Construction Directive Memorandum CD-2003-2). You also failed to provide leadership and did not take quick and decisive action to resolve the problem with the work order once it was brought to your attention. FHWA has disallowed funding for this $3.9 million and it may result in the loss of Federal participation of other work orders on the project which have totaled $956,672.00.*

On January 26, 2004, 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 she requested a hearing. On February 26, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 19, 2004, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

ISSUE

Whether Grievant should receive a Group III Written Notice of disciplinary action with demotion for failure to provide adequate supervision.

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 District Administrator until her demotion effective January 21, 2004. She worked for the Agency for almost two decades. She had held numerous positions of increasing responsibility. On April 15, 2002, she was promoted to District Administrator. Her duties included overseeing staff in the District office and also several VDOT Residencies. As District Administrator, she was responsible for overseeing delivery of all VDOT services in a particular geographical area[1] and managing a budget of over $400 million. Approximately 1,400 employees were in her chain of command.

The District Construction Engineer worked in the District office and reported directly to Grievant.[2] The Resident Engineer worked in a Residency away from the

[1] The purpose of Grievant's position was: "This position is responsible for district-wide strategic planning, direction, coordination and administration for all functions, programs, and activities in the [District]. The position works closely with the Central Office and state, city, and county boards and governing bodies to ensure the objectives of the agency and public are met." Grievant Exhibit 3.

[2] He had held the position of District Construction Engineer for approximately one year.

District Office and reported directly to Grievant. The Construction Quality Engineer is located at the Central Office and did not report to Grievant. The VDOT Inspector General is located at the Central Office and reports to the Transportation Commissioner and the Secretary of Transportation.

The Transportation Commissioner had some concerns about Grievant's leadership abilities in August 2003. He wrote her a letter stating, in part:

> I'll sum up by leaving you with one thought: Be involved. Being involved does not mean meddling. It does not mean being hard to get along with. And, it does not mean that your life has to be constantly turned upside down in a sea of confusion. But, involvement does mean being noticed by everyone that works for you. If you only talk to your direct reports, then you're being a manager, not a leader.
>
> Step out. You have the talent required to be a great leader. I can feel it. It's up to you to realize it and bring it to the forefront.[3]

On May 29, 2003, the Agency issued Construction Directive Memorandum number CD-2003-2 governing Control of Contract Expenditures and setting forth standards for Work Orders, Force Accounts, Overruns, and Contract Expenditures.[4] Under this directive, the Resident Engineer had the Agency's approval authority regarding expenditures up to $100,000 for any road system and up to $200,000 for a Secondary system. The District Administrator had approval authority for expenditures up to $750,000 on any road system. Agency expenditures exceeding $750,000 had to be approved by Central Office staff.[5]

District Administrators could delegate their signature authority under CD-2003-2 but accountability for compliance with the policy remained with the District Administrator. Grievant delegated her signature authority to the District Construction Engineer.

The Federal Highway Administration (FHWA) participates financially in some projects administered by VDOT. In those instances, the FHWA has greater oversight regarding how monies are spent. For some smaller projects, the FHWA will provide financial support but not provide heightened oversight, thereby trusting VDOT to oversee the project.

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[3] Agency Exhibit 37.

[4] Agency Exhibit 30.

[5] For example, work orders recommended by the Residency and District that exceed $750,000 are reviewed by the State Construction Engineer who then may recommend approval to the Chief Engineer of Operations.

In Summer 2003, a Contractor requested that VDOT pay it $5.2 million in order to resolve outstanding claims for work performed by the Contractor above and beyond the original project expectations. In August 2003, the District Construction Engineer and the Construction Quality Engineer developed a work order in the amount of $2.8 million with a provision for the audit of the contractor's overhead. The work order was presented to the Contractor for review. The Contractor rejected the work order as inadequate, but told the District Construction Engineer that the Contractor would settle for a $3.9 million payment.

In September 2003, the District Construction Engineer revised his calculations to increase the dollar amount from $2.8 million to $3.9 million. He directed the Residency to write the work order on September 29, 2003.[6] He failed to insist on a provision for an audit of the Contractor's overhead. Residency staff helped draft the work order. The Resident Engineer, however, refused to sign the work order as he would otherwise do in the normal course of business because he did not approve of the work order.

On October 3, 2003, the FHWA Area Engineer requested documents supporting the amount of the work order.

On October 9, 2003, the Contractor agreed to the $3.9 million work order and signed it.[7]

October 15, 2003, the FHWA Area Engineer reminded the District Construction Engineer of her request for supporting documents. One day later, the District Construction Engineer provided the FHWA Area Engineer with four line items in the work order, but did not supply the supporting documentation. On October 17, 2003, the FHWA Area Engineer again requested the supporting documents.

On October 22, 2003, the District Construction Engineer signed the work order on the wrong line. Instead of signing on the line indicating his recommendation for approval, he signed on the line indicating approval thereby converting a recommendation for action into action. He exceeded the approval authority delegated to him by Grievant. He caused the work order to be entered into the TRNS*PORT system. He also sent the work order to the Central Office.

The District Construction Engineer responded to the FHWA Area Engineer on October 29, 2003 by telling her he increased the amount of the work order because of the additional financial exposure, but admitted there was no detailed breakdown that he could provide to her to justify the work order amounts.[8] On November 17, 2003, the FHWA Area Engineer informed the District Construction Engineer by email that she

[6] Agency Exhibit 17.

[7] Agency Exhibit 16.

[8] The FHWA Area Engineer learned that the Contractor had been paid as of October 31, 2003. See Grievant Exhibit 20.

would designate the "$3.9 million work order as non-participating" thereby denying reimbursement with Federal funds.[9]

On November 18, 2003, the State Scheduling and Contract Engineer at the Central Office sent the District Construction Engineer a memorandum[10] stating:

> I have reviewed the Work Order No. 62 for the referenced project and will not recommend it for approval. I am returning the Work Order to you.
>
> The number of days extended does not match the Engineer's Explanation. It appears that extension should be for 598 days. Of these days, 445 are compensable and 153 are non-compensable. It appears this is a resolution of notices of intent to file claim. There should be a non-standard item code assigned to each item and a better description of each item. Or, one lump sum item with a detailed description attached.
>
> The primary reason I will not recommend this Work Order for approval is the lack of supporting data. I have seen the Residency's analysis, which was not included in the submittal, and need to see a similar justification for items that are included in the Work Order.
>
> I suggest you furnish your justification for each item, summarize the items, correct the C-10 technical errors, and after the Contractor re-signs, submit the Work Order again for approval.[11]

On November 19, 2003, the Agency's Financial Management System interfaced with the TRNS*PORT system and registered the $3.9 million for payment.[12] The District Contract Administrator was on leave on November 24, 2003. In her place, the District Construction Engineer approved payment of the $3.9 million under the Financial Management System. The Contractor was paid $3,905,951.09 by electronic transfer on November 28, 2003.[13]

On November 26, 2003, the FHWA Area Engineer sent the District Construction Engineer a letter stating,

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[9] Agency Exhibit 11.

[10] The Construction Quality Engineer handed delivered the letter to the District Construction Engineer on November 18, 2003.

[11] Grievant Exhibit 17.

[12] Agency Exhibit 21.

[13] Agency Exhibit 22.

> This will serve to formally notify you that FHWA is not participating in Work Order #62 …. *** As you will recall from our previous e-mail exchanges and conversations, FHWA had requested a copy of the justification for this work order. We were particularly interested in how the Department arrived at the conclusion that the amount was justified, when the amount that the Residency & Project staff had been able to support (viewed upon request in August) was considerably less.
>
> Additionally, due to the concerns that have arisen during the course of this query, and the lack of information available on this particular work order, FHWA requests copies of all 61 previous project work orders and the supporting documentation for those work orders. Upon receipt and spot/ selective review, FHWA will make a determination on the status of the project's federal funding.[14]

VDOT's Inspector General is responsible for detecting fraud, waste, and abuse. He reports to the VDOT Transportation Commissioner and the Secretary of Transportation. On December 5, 2003, the VDOT Inspector General sent Grievant an email stating:

> I am in receipt of a letter dated November 26, 2003 from [FHWA Area Engineer] to [District Construction Engineer] re the above referenced project. It appears that FHWA is not satisfied with [District Construction Engineer's] explanation of how the amount of work order #62 was determined and has ruled that the work order for $3,905,951 is not eligible for federal participation. This review of the work order #62 apparently has led to a further review of all work orders on the project. From my reading of the letter, we may lose federal funding on the entire project.
>
> I would appreciate you briefing me on this matter. Do we have a good case for the work order? Providing documentation for a work order should be routine. Are there other issues complicating this matter?

On Friday, December 12, 2003, the Inspector General called Grievant to find out what she had done in response to his December 5th email.[15] Grievant had not yet researched the problem.[16] She had not seen the November 26, 2003 letter from the FHWA Area Engineer denying federal reimbursement.

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[14] Grievant Exhibit 16.

[15] Grievant read the email on Monday, December 8, 2003.

[16] Grievant contends that she spoke with the District Construction Engineer sometime between December 8 and December 11, 2003. The evidence does not support this contention. If she had spoken with the District Construction Engineer during that time period, she would have told the Inspector General of what she had done. Instead, she left him with the impression she had not begun researching the problem.

On December 16, 2003, the Inspector General spoke with the Construction Quality Engineer about the work order. The Construction Quality Engineer was shocked to learn that the work order had been paid since he had informed the District Construction Engineer that the work order was denied and no one with proper authority had authorized payment.

On December 19, 2003, Grievant sent the Transportation Commissioner an email regarding work order #62. She ended the email by saying, "I will keep you informed on how this develops. From my perspective it is not unusual to have this type of inquiry from FHWA when we are dealing in indirect cost (overhead; lost productivity, etc.)."[17]

Grievant learned of the full extent of the District Construction Engineer's malfeasance on December 28, 2003 when she received a copy of a letter outlining dates and actions taken by the District Construction Engineer.

On January 13, 2004, the FHWA Area Engineer wrote the District Construction Engineer disallowing federal funding for the other 61 work orders and requesting repayment of $956,672 already paid. Ultimately, the Commonwealth spent over two million dollars (including funds from work order #62) from the Virginia Transportation fund that would otherwise have been paid by the FHWA.[18]

On January 22, 2004, Grievant issued a Group II Written Notice with five workdays suspension to the District Construction Engineer for his handling of the work order.[19] Grievant's replacement reviewed the actions taken by the District Construction Engineer and concluded a Group III Written Notice with removal was a more appropriate disciplinary action against the District Construction Engineer. The Group II Written Notice was replaced with a Group III Written Notice. The District Construction Engineer chose to resign on February 9, 2004 rather than dispute the disciplinary action.

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

[17] Grievant Exhibit 6.

[18] The Chief of Systems testified that the maximum amount of federal reimbursement for work order #62 would have been 80 percent of $2.1 million. $2.1 million is the amount Agency Central Office staff reported was actually due to the Contractor.

[19] Grievant also indicated she would remove the District Construction Engineer's work order approval authority for at least six months.

force." DHRM § 1.60(V)(B). [20] 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).

DHRM § 1.60(V) lists numerous examples of offenses. These examples "are not all-inclusive, but are intended as examples of unacceptable behavior for which specific disciplinary actions may be warranted. Accordingly, any offense which, in the judgement of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section."

This case is difficult to resolve. Grievant has an impeccable academic record and a long work history of consistent achievements and advancements. Every aspect of her career and demonstrated leadership suggests she is someone who should be an extraordinary District Administrator. The Hearing Officer has given this appeal much consideration.

The position of District Administrator is essentially the Chief Executive Officer for a particular region of the Commonwealth. Errors that may otherwise appear minor can be amplified when made by a District Administrator. It is appropriate for the Agency to hold District Administrators to very high standards given the possible consequences to the Agency and to Virginians.

VDOT has presented sufficient evidence to support its issuance of a Group III Written Notice with demotion.[21] Grievant should have attached greater urgency than she did to the December 5, 2003 email from the VDOT Inspector General. She should have immediately reviewed the work order, determined its status, and examined the actions of all employees, including the District Construction Engineer, involved in the work order. For example, if Grievant had simply looked at the work order herself, many of the key facts of this case would have been revealed. The work order was not signed by the Resident Engineer. Grievant could have asked him why he did not sign the work order and asked the District Construction Engineer why he processed the order over the disapproval of the Resident Engineer. The work order would have revealed that the District Construction Engineer exceeded his authority by approving the work order rather than merely recommending approval. Grievant could have begun questioning the District Construction Engineer's actions immediately.

Even though neither the Inspector General, nor Grievant was aware of the District Construction Engineer's errors and subterfuge on December 5, 2003, the

[20] The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

[21] DHRM Policy 1.60 requires a five percent minimum pay reduction following an involuntary demotion.

Inspector General was clearly asking Grievant to take some form of action to investigate and resolve a problem whose parameters were unknown and a problem that was not merely the routine assembling of documents to support one work order.[22] Grievant's initial response was to do nothing. Only after a week passed and the Inspector General called Grievant on December 12, 2003 did Grievant begin to take any action. It is not clear whether Grievant would have taken any action in response to the Inspector General's December 5th email had he not called her a week later. On Monday, December 15, 2003, Grievant sent the Inspector General an email saying, "I have not looked at the information in detail but what [the District Construction Engineer] has done sounds reasonable to me." Grievant's failure to look at the details is what prevented her from being able to answer the Inspector General's question regarding whether there were "other issues complicating this matter."

The Agency's conclusion to demote Grievant is confirmed by her management decisions after learning the details of what happened.[23] The District Construction Engineer exceeded the scope of the District's authority to obligate the Department for payment of a claim. He disregarded the advice of the Resident Engineer. He defied the Construction Quality Engineer who informed Grievant that the $3.9 million work order was denied and that Grievant should re-work the supporting documentation for the project. He tried to keep secret the FHWA Area Engineer's denial of Federal reimbursement. He approved payment of the work order without any authority to do so. In essence, the District Construction Engineer circumvented all of the checks and balances set in place by the Agency to avoid improper payments to contractors. After Grievant had the opportunity to investigate the matter, she concluded that the District Construction Engineer should only receive a Group II Written Notice with five workday suspension. Given the level of improper behavior by the District Construction Engineer, Grievant should have removed him from employment with little hesitancy.[24] Her failure to do so reflects a level of managerial decision-making that places the Agency at risk of damage from future rogue employees.[25]

Grievant contends that she understood the Inspector General's email to be a routine request for documentation supporting work order #62. Her argument fails for several reasons. First, since the email was sent by the VDOT Inspector General, Grievant should have known that the Agency was attaching urgency and importance to

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[22] For example, when the Inspector General states "Providing documentation for a work order should be routine" he is informing Grievant that the problem she is facing may not be routine. The Inspector General emphasizes this point when he asks, "Are there other issues complicating this matter?"

[23] As of December 28, 2003, she was aware of all of the Agency's facts supporting the improper behavior by the District Construction Engineer.

[24] Even if Grievant believed that the costs could ultimately be supported with appropriate documents, the District Construction Engineer's actions were so egregious as to warrant removal.

[25] Grievant's replacement as District Administrator immediately reviewed the District Construction Engineer's actions and appropriately issued him a Group III Written Notice with removal.

the matter.[26] Second, the email informs Grievant that not only was work order #62 being questioned by FHWA, but FHWA had taken the unusual step of reviewing 61 related work orders and that the Agency may lose federal funding for the entire project. Third, the Inspector General refers to documentation but then asks "Are there other issues complicating this matter?"

Grievant contends that she was not responsible for the actions of the District Construction Engineer because she did not know he was acting contrary to policy and contrary to the Agency's best interest. Grievant is correct that she is not responsible for the actions of District Construction Engineer, but she is not being disciplined specifically for those actions. Grievant is being disciplined because she failed to provide timely and effective management once a problem was identified. A fully engaged manager would have acted sooner and with greater involvement than did Grievant.

Grievant argues that her behavior at best amounts to inadequate or unsatisfactory work performance which is a Group I offense. A district administrator has responsibility for decision-making regarding the spending of millions of taxpayer dollars. Grievant had independent authority to approve work orders of $750,000. Errors that may otherwise seem insignificant if committed by an employee in a low-level position, can have enormous consequences to the Commonwealth when made by a District Administrator. Grievant's failure to act rises to the level of a Group III offense.

Grievant contends that it is not unusual for the FHWA to initially deny reimbursement for work orders and then reverse that decision once the necessary documentation was provided. Grievant presented examples of situations to support her position. Assuming Grievant's assertion is correct, this assertion supports the Agency's position -- not Grievant's. When the VDOT Inspector General emailed Grievant with a problem that could have resulted from many causes, Grievant presupposed the problem was only the need to obtain missing documentation in order to respond to FHWA. By making this supposition, Grievant failed to fully explore other possibilities as requested by the VDOT Inspector General.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with demotion 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:

[26] The VDOT Inspector General testified that it was not routine or usual for him to request a briefing from a District Administrator regarding a work order.

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. Please address your request to:

   Director
   Department of Human Resource Management
   101 North 14th St., 12th Floor
   Richmond, VA 23219

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. Please address your request to:

   Director
   Department of Employment Dispute Resolution
   830 East Main St. STE 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. 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.[27]

[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].

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

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Carl Wilson Schmidt, Esq.
Hearing Officer