

Issue: Group III Written Notice with termination (failure to follow safety rules and failure to follow supervisor's instructions); Hearing Date: 06/14/04; Decision Issued: 06/21/04; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 739



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 739

Hearing Date: June 14, 2004
Decision Issued: June 21, 2004

PROCEDURAL ISSUE

Grievant requested as part of his relief that he receive an apology. A hearing officer does not have authority to require the issuance of an apology.¹ Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Facility Manager

¹ § 5.9(b)6 & 7. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

Representative for Agency
Five witnesses for Agency

ISSUES

Was the grievant's conduct such as to 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 grievance from a Group III Written Notice issued for violating established safety rules and failing to follow supervisor's instructions.² Grievant was removed from employment effective April 2, 2004 as part of the disciplinary action. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³ The Virginia Department of Transportation (VDOT) (Hereinafter referred to as "agency") has employed grievant as an Electrician for six years.

The agency has promulgated a safety belt policy that provides, in pertinent part, "Safety belts shall be worn properly by all Agency personnel on official State business while operating or riding in vehicles or equipment so equipped whenever the vehicle or equipment is in motion."⁴ The policy provides exceptions for instances where it is impossible to operate the vehicle or equipment while wearing a safety belt, such as a road grader. It is understood that when employees are working *within* a designated work zone on various types of equipment, it is not always possible to be seated using a safety belt. However, it is also understood that the safety belt policy cited above means that when such equipment is being driven on an interstate highway, *outside* a protected work zone, employees should be riding inside the vehicle with safety belts fastened.

Prior to 2003, the agency had utilized the platform on a tunnel-washing tanker truck to provide access to the lights located in an interstate highway tunnel. In about mid-2003, the agency fabricated a platform that could be fastened to a dump truck for use in tunnel lighting repair.⁵ The platform was designed to be used only in the eastbound tunnel. A lower platform was

² Agency Exhibit 2. Written Notice, issued March 29, 2004.

³ Agency Exhibit 3. Grievance Form A, filed April 12, 2004.

⁴ Agency Exhibit 6. *Safety Belt Usage Motor Vehicle/Equipment*, effective January 15, 1986, reissued July 2002. NOTE: See also Agency Exhibit 4. *Safety Rules*, revised March 7, 2003. This policy requires vehicle/equipment operators to wear seat belts but for some unknown reason fails to include *passengers* in the mandate.

⁵ Agency Exhibit 7. Photographs of platform truck.

fabricated for use in the westbound tunnel because that tunnel is two feet, nine inches shorter than the eastbound tunnel.⁶

On the evening of March 16, 2004, while grievant and another electrician were repairing and replacing lights in the eastbound tunnel of an interstate highway, the facility manager visited the work zone to observe progress. He and the maintenance superintendent met with the electricians, including grievant, and instructed them on meal and break procedures. He specifically directed the crew to leave the tunnel either by riding in the cab of the truck with the driver, or by radioing for a pickup truck to come into the tunnel to provide transportation. The facility manager instructed grievant and the others while they were gathered in a small group at the rear of the truck; all nodded their heads to indicate agreement and understanding of the instruction. The cab of the platform truck has sufficient seating space and safety belts for three people including the driver.⁷

On the evening of March 17, 2004, grievant and another electrician were replacing lights in the right lane of the eastbound tunnel. Grievant was the lead electrician in the three-man crew because the other electrician was on loan from another facility. Thus, grievant was the *de facto* team leader. The portion of the highway and tunnel in which they were working was designated a work zone by reflective cones, barrels, crash trucks, and arrow trucks that directed traffic to the left lane. They rode on the platform while the truck driver slowly moved from light to light. At about 11:30 p.m., the crew decided to take a meal break. Grievant descended from the platform and told the driver to take them back to the repair shop at the west end of the eastbound tunnel. Grievant then got back on the platform; he and the other electrician each sat on triangular braces facing the rear of the truck. The seats are approximately 21 inches from the top rail of the platform; the top rail of the platform is 13 feet, one inch from the ground. The driver exited from the eastbound tunnel, crossed the interstate on an overhead loop at the end of the tunnel, and reentered the interstate in order to drive at highway speed through the westbound tunnel. The westbound tunnel was not a protected work zone. The ceiling of the westbound tunnel is only 13 feet, 11 inches high. As the truck entered the westbound tunnel, both electricians' heads struck the ceiling of the tunnel entrance. The other electrician was killed; grievant was treated at a local hospital and released.⁸ The accident received publicity in the local news media.

Following an investigation and due process, both grievant and the driver were disciplined and removed from state employment. It has been a common practice for employees to ride on the platforms of both dump trucks and tanker trucks when coming out of the tunnels. No employees have previously been disciplined for this practice.

⁶ The eastbound tunnel was built several years after the westbound tunnel and has a higher ceiling.

⁷ Agency Exhibit 2. Memorandum to grievant from maintenance superintendent, March 26, 2004.

⁸ Grievant Exhibit 3. Newspaper article, March 19, 2004.

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 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. In all other actions the employee must present his evidence first and must prove his claim by a preponderance of the evidence.⁹

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 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.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally

⁹ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

should warrant removal from employment. Violating safety rules where there is a threat of physical harm is a Group III offense.¹⁰ Group II offenses are less severe than Group III and include failure to follow a supervisor's instructions.

The agency has demonstrated, by a preponderance of evidence, that grievant failed to follow a supervisor's instructions. On the evening before the incident, the facility manager and the maintenance superintendent had both come to the tunnel to observe work progress. The superintendent instructed grievant and two other electricians to either ride in the truck cab or radio for a pickup truck when they wanted to take breaks outside the tunnel. Although grievant stated that he does not recall this instruction, both the maintenance superintendent and another electrician corroborated the facility manager's testimony. Accordingly, grievant knowingly failed to follow a supervisor's direct and unambiguous instruction – a Group II offense.

The agency has also shown that grievant violated a safety rule by failing to ride in the truck cab with a safety belt. The evidence is undisputed that the truck cab can accommodate a driver and two passengers. Grievant suggested that because the driver had a small cooler and other items on the seat, there was not sufficient room for people. This is a self-serving excuse that has no merit. To suggest that a cooler and other inanimate items should take priority over the safety of people is ludicrous. Moreover, grievant acknowledged that on the three preceding evenings, he and the other electrician had taken breaks by riding in the pickup truck available for that purpose. Thus, there was no reason that grievant could not have radioed to again have the pickup truck take them on their break. Grievant's violation of the safety rule where there was threat of physical harm is a Group III offense.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice issued on March 30, 2004 for violation of safety rules, and grievant's removal from employment on April 2, 2004 are hereby UPHELD.

The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

¹⁰ Exhibit 5. Section V.B.3.g, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

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

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.¹¹ 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.¹²

¹¹ 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).

¹² 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]

David J. Latham, Esq.
Hearing Officer