

Issue: Group I Written Notice (unsatisfactory work performance); Hearing Date: 07/30/04; Decision Issued: 08/02/04; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 778



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 778

Hearing Date: July 30, 2004
Decision Issued: August 2, 2004

APPEARANCES

Grievant
Maintenance Superintendent
Representative for Agency
Two 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 I Written Notice issued for unsatisfactory work performance.¹ Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.² The Virginia Department of Transportation (VDOT) (Hereinafter referred to as “agency”) has employed grievant as a transportation operator for five years. Grievant has one prior active disciplinary action – a Group I Written Notice for failure to follow supervisor’s instructions and unsatisfactory work performance.³

Agency employees who operate maintenance vehicles are required to have a commercial driver’s license and to comply with the provisions of the Virginia Commercial Driver’s Manual. The Manual requires, inter alia, that operators must conduct a pre-trip inspection of the vehicle before every trip; both federal and state laws mandate this type of inspection.⁴ The inspection is comprehensive and includes checking tires, wheels and rims, brakes, steering system, suspension system, exhaust system, emergency equipment, and cargo. After reviewing the last vehicle inspection report, the operator is required to check the engine compartment for all fluid levels (including oil, coolant, power steering fluid, windshield washer fluid, battery fluid, and automatic transmission fluid), belts, and leaks.⁵ The agency has promulgated a policy that includes an operator checklist that includes the specific tasks to be performed during the pre-trip inspection.⁶ The checklist for grievant’s truck lists 21 specific items that must be checked prior to each trip.⁷

On January 29, 2004, grievant was assigned to operate a crash truck⁸ in support of a maintenance crew repairing potholes on a state-maintained U.S. highway. When grievant approached the truck in the morning, the truck had accumulated a coating of snow and ice overnight which made it impossible for grievant to open the hood of the truck. She asked the driver of a nearby truck whether this particular vehicle had been using oil; he responded that it had not; the truck is fairly new and has less than 20,000 miles. She started the truck to warm up the engine and defrost the windshield. She then spent several minutes conducting safety checks around the truck that could be accomplished without

¹ Exhibit 4. Written Notice, issued February 5, 2004.

² Exhibit 7. Grievance Form A, filed March 8, 2004. NOTE: Grievant failed to file her grievance within 30 calendar days of the Written Notice (required by § 2.2, Grievance Procedure Manual, effective July 1, 2001). However, the agency thereafter allowed the grievance to proceed through the resolution steps and qualified the grievance for a hearing. Accordingly, the agency has effectively waived the 30-day requirement in this case.

³ Exhibit 6. Written Notice, issued October 6, 2003.

⁴ Exhibit 1, p. 1-1. *Virginia Commercial Driver’s Manual*, July 2000.

⁵ Exhibit 1, p. 1-4. *Ibid.*

⁶ Exhibit 2. Policy 5.00, *Statewide Equipment PM Program*, November 1, 2002.

⁷ Exhibit 3. Pre-operational Check List, January 2004.

⁸ A crash truck is equipped with a collapsible barrier and a flashing directional arrow. The crash truck is stationed at the beginning of a protected work zone during lane closures for highway maintenance.

opening the hood. During this time, grievant's supervisor (maintenance supervisor) and two crewmen had been filling their truck with patching material. The supervisor drove up to grievant's vehicle and offered grievant an ice scraper for her windshield and asked whether grievant had checked the truck's oil yet. Grievant said she was unable to open the hood due to the accumulation of snow and ice. The supervisor directed his two crew men to pop the latches on either side of the hood and open it. They broke the ice off, opened the hood and then rejoined the supervisor who drove to the job site.

Grievant closed the hood before the supervisor left to let the engine continue warming up. After finishing her other safety checks, she reopened the hood, checked the oil and belts and some – but not all – of the other fluids. During the hearing, grievant candidly admitted that she did not check tire pressures, hydraulic fluid, battery fluid, power steering fluid, or automatic transmission fluid. She closed the hood, drove to the office, and initialed the check list form, which is kept in a hanging file under the vehicle key board.⁹ She used the restroom and then drove to the job site.

The road on which potholes were being filled is a four-lane divided highway. The supervisor left the agency facility and drove westbound for 17 miles to the county line looking for potholes. Finding none, he then made a U-turn, drove eastbound, and located the first pothole at about five miles from the county line. Grievant drove westbound until she found the crew working in the eastbound lanes and joined them. She arrived at the work site after the supervisor had been there for about ten minutes.

The supervisor performs his pre-trip inspection in 20 minutes; a crew man testified that the pre-trip inspection takes him about 15 minutes although on a snowy morning it might take him up to 30 minutes.

The supervisor concluded that grievant had not performed the pre-trip inspection because he thought she had not had sufficient time to do the inspection between the time he left the agency facility and the time grievant arrived at the job site. A Group I Written Notice was issued charging that grievant had not performed a pre-trip inspection.

During the past four years, three or four other employees have been either disciplined or counseled for the same or similar offenses.

APPLICABLE LAW AND OPINION

⁹ It appears from the check list form that grievant mistakenly initialed the form under the date of the 27th, when the actual date was the 29th. NOTE: Exhibit 4 includes a check list form for March 2004; it appears that this form was erroneously included in the agency's exhibits because it has no known connection or relevance to what occurred on January 29, 2004.

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 present its evidence first and 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 her evidence first and must prove her claim by a preponderance of the evidence.¹⁰

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.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group I are the least severe category of offense; one example is inadequate or unsatisfactory work performance.¹¹

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

¹¹ Exhibit 5. Section V.B.1.d, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

A preponderance of evidence in this case reflects that grievant performed a partial pre-trip inspection prior to her trip on January 29, 2004. Her undisputed testimony establishes that she inspected most of the required items except for those located under the hood before the maintenance supervisor drove up to her vehicle. After the hood was opened and the supervisor left, grievant checked the oil and a few other items under the hood.

The supervisor's conclusion that grievant did not perform any inspection is based on an incorrect assumption. The supervisor assumed grievant did not have sufficient time between the time he left the facility and the time grievant arrived at the worksite to perform her inspection. According to the supervisor's testimony and that of another agency witness, an inspection takes between 15 and 20 minutes. Grievant had performed half of that inspection before the supervisor drove up to her truck, leaving her only 10 minutes of inspection yet to perform. When the supervisor left the facility, he drove 22 miles to the work site (17 miles to the county line and 5 miles back toward the facility), which would have taken him at least 25 minutes (assuming he was within the speed limit). He was at the work site at least 5-10 minutes (his estimate) when grievant arrived. During that total of 30-35 minutes, grievant had ample time to complete 10 minutes of inspection, go to the restroom, and then drive 12 miles to the work site. Therefore, the agency has failed to prove that grievant did not check the oil in the truck before leaving the facility.

However, the evidence is sufficient to conclude that grievant did not perform a *complete* inspection. By her own admission, grievant did not check all of the fluids under the hood, hydraulic fluid, or tire pressures. Moreover, grievant stated during the hearing that she thought "automatic transmission and power steering are the same thing." Grievant's confusion about these items suggests that she may be unaware that there are two different fluid reservoirs for these two different parts of the truck. Thus, while grievant completed a *partial* inspection of the truck, she admittedly did not inspect all items on the pre-trip check list. This constitutes unsatisfactory work performance.

Grievant avers that before the supervisor drove up to her truck, she had opened the hood latches but was unable to lift the hood because of the snow and ice accumulation on the hood. The crew man who testified said that the latches still had ice on them, which he had to break off before opening the latches. The crew man told the maintenance superintendent the same thing.¹² The maintenance supervisor corroborated the two crewmen's testimony. Thus, the preponderance of evidence indicates that grievant did not, in fact, attempt to open the hood before the supervisor arrived. This inconsistency taints grievant's credibility.

While the agency has not overcome grievant's testimony that she checked the truck's oil before leaving the facility, her cursory and partial inspection is troublesome for another reason. Grievant had previously been disciplined for not

¹² Exhibit 4. Letter from maintenance superintendent to grievant, February 4, 2004.

checking the oil on another piece of equipment. That should have made her especially sensitive to the need to conduct a thorough inspection before each trip in the agency's truck. Although grievant asserts that she checked the truck's oil on January 29, 2004, she did not check other fluid levels that can be equally important. If power steering fluid is gone, a truck would become very difficult to maneuver. If transmission fluid is gone, the transmission may seize up. Lack of battery fluid could result in loss of electrical power.

Grievant alleges that she is being subjected to more scrutiny than the males in her work crew. While that may or may not be true, grievant has offered no testimony or evidence to corroborate her allegation. However, given that grievant had previously been disciplined for failing to check oil in a piece of equipment, it would be natural for a supervisor to check more carefully to assure that grievant is conducting all appropriate checks. If that is why the supervisor is watching her performance more closely, it is reasonable and justifiable. On the other hand, if, as grievant infers, the closer scrutiny is solely related to her gender, that would be both inappropriate and discriminatory. The supervisor should closely monitor his own conduct to assure that he checks the performance of all his employees equally – both male and female.

DECISION

The disciplinary action of the agency is affirmed.

The Group I Written Notice issued on February 5, 2004 for unsatisfactory work performance is hereby UPHELD. The disciplinary action shall remain active pursuant to the guidelines in Section VII.B.2 of the Standards of Conduct.

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.¹³ 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.¹⁴

[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

¹³ 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).

¹⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.