

Issue: Group II Written Notice with suspension (violating safety rules); Hearing Date: 10/07/04; Decision Issued: 10/18/04; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 7874



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 7874**

Hearing Date: October 7, 2004  
Decision Issued: October 18, 2004

**PROCEDURAL HISTORY**

On April 5, 2004, Grievant was issued a Group II Written Notice of disciplinary action with five workdays suspension for:

You exhibited an unsafe action as defined in VDOT's policy No. 1.60, Standards of Conduct, and against safety instructions conspicuously posted at the heavy-duty tire-changing machine at the [local facility]. Specifically, on March 16, 2004 when changing an 11R-22.4 sized tire, you departed the work area with the tire remaining on the tire-changing machine and with the air filled line still connected and pumping air into the tire. Safety instructions posted on the machine include "Do not inflate the tire on this machine. Use a Safety Cage".

On May 3, 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 he requested a hearing. On September 13, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 7, 2004, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for violating a safety rule where there is not a threat of bodily harm.

## **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 employs Grievant as an Equipment Repair Tech. He has been employed by the Agency for several years. Grievant had received prior disciplinary action but the written notices were not presented as evidence.

The Residency Shop has a large tire changing machine designed to hold the tire rim in place while the tire is removed from the rim. On the tire changing machine directly in front of the controls used to operate the machine is a sign printed in red letters entitled "DANGER." The second item on the sign states:

Do not inflate the tire on this machine. Use a safety cage. Rim or tire explosions during inflation may cause serious injury or death.<sup>1</sup>

The machine manufacturer placed the sign on the machine and the sign was on the machine when it was delivered and installed several years ago.

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<sup>1</sup> Agency Exhibit 3.

On the wall near the tire changing machine is a large poster entitled: "Demounting and Mounting Procedures for Truck/Bus Tires." It shows the procedures for deflation and removing the tire from the wheel for several different tube types including: Single Piece Rim; Solid Rim/Split Ring; Split Rim/Solid Ring; Solid Rim/Solid Ring; Solid Rim/Solid Flange/Split Lock Ring; and Semi-Drop Center Solid Rim/Solid Ring. Under the Inflation section of the poster, it states:

Never inflate beyond 5 psi before placing the tire/rim assembly in a restraining device that meets OSHA standard.<sup>2</sup>

Immediately outside of the Residency Shop is a tire cage that serves as a restraining device meeting OSHA standards. The cage consists of four large bars covering a standing tire. If a tire were to explode while being filled with air, the cage would stop many of the large pieces from hitting anyone standing nearby.

On March 16, 2004 at approximately 1:45 p.m., Grievant was in the tire room of the Residency shop. He was changing a tire a single piece rim 22.5" tire on the tire changing machine. Grievant hooked an air line to the tire and began filling the tire with air while it remained on the tire changing machine. As the tire was filling with air, Grievant left the shop for several minutes. While Grievant was away, another employee entered the shop in order to begin filling a small tire with air. When the employee noticed that a large tire was being filled on the tire changing machine, the employee became distressed because of the obvious danger and immediately left the shop. The employee waited until after Grievant finished filling the tire before returning to the shop. Filling the tire with air requires approximately 15 to 20 minutes.

## 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 force." DHRM § 1.60(V)(B).<sup>3</sup> 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).

"Violating a safety rule where there is not a threat of bodily harm" is a Group II offense.<sup>4</sup> By filling the tire with air while the tire was on the large tire changing machine,

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<sup>2</sup> Agency Exhibit 3.

<sup>3</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

<sup>4</sup> DHRM Policy 1.60(V)(B)(2)(b).

Grievant violated a prominently displayed safety rule. Grievant should have filled the tire with air after placing it in the tire cage located immediately outside the Residency Shop. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice. A five workday suspension is permitted under the Standards of Conduct when an Agency issues a Group II Written Notice.

Grievant argues that he did not intend to violate any safety rules. He contends he was relying upon the training he had received from other employees in the shop. Grievant believes he was not endangering any other employees. He did not read the signs posted on the machines because he believed they applied only to the process for changing split rim tires and Grievant was changing a single piece rim tire.

Grievant's arguments fail because it is not necessary for him to intend to violate a safety rule. It is only necessary to show that he intended to take the action that resulted in a violation of safety rules. The Agency has established this. Grievant's actions endangered the safety of others in the shop because if the tire had exploded, pieces of it could have hit other employees. Contrary to Grievant's assertion, the posted signs discussed the procedures for changing single piece rim tires as well as split rim tires.

By prominently displaying signs on the tire changing machine and on the Shop wall, the Agency adequately placed Grievant on notice of what was expected of him. If the information contained in the signs conflicted with his prior training, he should have brought that matter to the attention of Agency managers.

## **DECISION**

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

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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>5</sup>

[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].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.