

Issue: Group II Written Notice with 5-workday suspension (failure to follow supervisor's instructions or perform assigned work); Hearing Date: 05/07/04; Decision Issued: 05/25/04; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq; Case No. 690



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 690**

Hearing Date: May 7, 2004  
Decision Issued: May 25, 2004

**PROCEDURAL HISTORY**

On February 9, 2004, Grievant was issued a Group II Written Notice of disciplinary action with five workday<sup>1</sup> suspension for:

*Group II Notice – Failure to follow supervisors instructions, perform assigned work, or otherwise comply with written policy; leaving the work site during working hours without supervisors permission; inadequate or unsatisfactory work performance; violating safety rules; and disruptive behavior. While assigned to the [Bridge] during inclement weather, you did not follow supervisors instructions for patrolling the bridge, you left the bridge and parked underneath the bridge, endangered the lives of the motoring public by patrolling the bridge three times without proper material to treat the bridge, and disrupted the work force by indicating to coworkers that you hung up on the AHQ superintendent while she was discussing your performance during this event.*

On March 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 April 15, 2004, the Department of Employment Dispute

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<sup>1</sup> The original Written Notice specified a ten workday suspension. During the step-process, the suspension was reduced to five workdays.

Resolution assigned this appeal to the Hearing Officer. On May 7, 2004, a hearing was held at the Agency's regional office.

## **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUE**

Whether Grievant should receive a Group II Written Notice of disciplinary action with a five workday suspension for failure to follow a supervisor's instructions or perform assigned work.

## **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 a Crew Member at one of its Facilities. One of Grievant's responsibilities includes driving snow removal equipment to clear roads during inclement weather. On June 25, 2003, Grievant received a Group II Written Notice for violation of DHRM Policy 2.30 and VDOT Policy 2.15.<sup>2</sup>

Agency managers had instructed the Superintendent that it was of primary importance that the Bridge "not be lost" due to inclement weather. The Bridge rises to 60 feet above water and spans approximately 1.1 miles. During inclement weather, approximately 30 minutes is necessary to patrol from one side of the Bridge to the

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<sup>2</sup> Agency Exhibit 4.

other. Weather conditions on one side of the Bridge are not always the same as weather conditions on the other side.

On January 13, 2004, the Superintendent held a meeting at the Bridge during which she informed Grievant that crew members must patrol on each side of the Bridge and stay on each side of the Bridge no longer than ten minutes. She also informed Grievant that the weather on one side of the Bridge may not be the same as the weather on the other side and she wanted them constantly to go back and forth across the Bridge regardless of whether there was any precipitation. She provided Grievant with a temperature gun to enable him to determine the temperature on the pavement.

The heating coil providing heat for defrosting the windshield of Grievant's tandem truck was not working at full capacity. As a result, Grievant frequently had to stop his vehicle and clean the windshield with a wiper in order to be able to see out of the window. On January 25, 2004, Grievant asked a supervisor if he could work on the truck's windshield wiper, but was told he could not given the need to constantly patrol the Bridge. Without a fully functioning defroster, Grievant's ability to quickly and timely patrol the Bridge was reduced.

On January 25, 2004, Grievant was dispatched to the Bridge at 11:30 a.m. to patrol the bridge due to inclement weather.<sup>3</sup> He did not travel back and forth across the bridge as instructed by the Superintendent. He remained on one side of the Bridge and patrolled that side. At approximately 3 p.m., snow began falling on the other side of the Bridge. At 3:58 p.m., the bridge span operator paged the Superintendent and notified her that he had not seen a tandem truck travel across the bridge all day. She contacted Grievant and he began patrolling across the bridge.

On January 26, 2004, Grievant arrived for work at 8 a.m. but did not begin patrolling until 9:27 a.m. Grievant's truck holds 7 tons of material. At approximately 3:45 p.m., Grievant had an inadequate amount of material to spread, if the weather declined suddenly. He cleared a parking lot near the area headquarters and could have reloaded at that time, but chose not to do so. As the end of Grievant's workday approached, he called his immediate supervisor by radio and requested a relief driver so that he could return to the area headquarters and reload his truck with materials. He informed his supervisor that he had approximately a wheel-barrow left of materials. He could not adequately spread materials on the pavement with such a low amount in his truck. Grievant was instructed to return to the area headquarters once a relief driver arrived to take over his patrol. Twenty minutes later, Grievant made another trip over the Bridge with a nearly empty truck. Approximately one hour<sup>4</sup> passed before Grievant returned to the area headquarters even though a relief driver had arrived much earlier.

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<sup>3</sup> Grievant had patrolled the Bridge on January 23, 2004 as a result of poor weather on that date.

<sup>4</sup> The Agency asserts this conversation occurred at approximately 7 p.m. Grievant asserts the conversation occurred at approximately 7:20 p.m. When the conversation occurred is not significant. What is significant is that Grievant waited approximately one hour before returning to the area headquarters even though a relief driver had been sent to assume his patrol duties.

At the end of Grievant's shift on January 26, 2004, the Superin

The Agency contends that Grievant did not travel across the Bridge every thirty minutes. For the most part, however, Grievant traveled across the Bridge within a reasonable time approaching 30 minutes. For those instances he failed to timely patrol, the delay can be explained because of the poorly working window defroster in his truck. In addition, the Agency contends Grievant should be disciplined for telling co-workers that he had hung up on the Superintendent. Although Grievant's actions were not good manners, his behavior does not in itself rise to the level of disciplinary action. No evidence was presented suggesting that the co-workers who heard Grievant felt differently or acted differently because of Grievant's comment. Even though the Agency has not established all of the underlying facts supporting its decision to take disciplinary action, it has presented sufficient evidence to support issuance of a Group II Written Notice with five workday suspension.<sup>8</sup>

Grievant contends that since he was counseled for his behavior on January 29, 2004 and believed the matter was settled, it was inappropriate for the Agency to issue disciplinary action. DHRM Policy 1.60 does not prohibit both counseling and issuance of disciplinary action. Grievant's argument is untenable.

Grievant contends he was denied procedural due process because the Superintendent read him the allegations against him during the meeting when she also presented him with the Group II Written Notice. Grievant's assertion is correct that he should have been given a reasonable time to respond to the charges against him before the Agency issued its disciplinary action. The Agency's misapplication of policy, however, is harmless error. Whatever defenses Grievant could have presented prior to having received the Group II Written Notice, were presented during the step-process and during the hearing. Grievant's defenses have not been weakened or altered because of the Agency's action.

## **DECISION**

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

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<sup>8</sup> The Agency has established that Grievant was not adequately prepared to prevent the Bridge from being lost due to inclement weather.

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>9</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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<sup>9</sup> 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