

Issue: Group II Written Notice (failure to perform assigned work); Hearing Date: 11/23/04; Decision Issued: 01/11/05; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 7910



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 7910

Hearing Date: November 23, 2004
Decision Issued: January 11, 2005

PROCEDURAL HISTORY

On July 16, 2004, Grievant was issued a Group II Written Notice of disciplinary action for:

[Grievant], this Group II Written Notice is being issued for failure to perform assigned work. This is a result of your actions on June 23, 2004, when your crew was assigned to perform emergency response on I-66. While other crew members, supervisors and managers were engaged in responding to an emergency, you chose to sit in your vehicle and had to be instructed by a manager to get out of your vehicle and to help with the emergency clean up. As noted in your Employee Work Profile, emergency response is one of your responsibilities. Your attitude and actions were unsatisfactory and disruptive to the operation.

On August 12, 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 November 3, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 23, 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 for failure to 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 locations. No evidence of prior disciplinary action against Grievant was introduced at the hearing.

In order to make emergency repairs on heavily traveled highways, VDOT's procedure is for several trucks to be used to block off travel lanes and form a barrier around the area where employees are working. Several of the trucks are called crash cushions and they are intended to receive the impact of vehicles traveling on the highway whose drivers do not recognize there is a problem ahead and then enter the zone where employees are working. Crash cushion trucks are supposed to be placed in between oncoming traffic and employees making repairs. Other trucks can also be used to block traffic lanes in which employees are not working.

On June 23, 2004, a concrete slab came apart only a few hours after being poured. The slab was part of a heavily traveled multi-lane Interstate road. A large pothole appeared as the slab separated. Vehicles could not travel over the pothole without significant risk of danger to all drivers passing nearby. An emergency existed.

Responsibility for addressing the emergency was assigned to Grievant's work crew. Four VDOT trucks assembled on the side of the road a distance away from the emergency site. The Crew Leader pulled his truck in front of the other trucks. Since the Crew Leader's truck contained the tools necessary to repair the pothole, the Crew Leader wanted his truck to be the first one in line. If Crew Leader's truck was the first one at the emergency, he could park it closest to the pothole. The Crew Leader got out of his truck to walk back to the other trucks. The Crew Leader passed Grievant and told Grievant that the Crew Leader would be the first truck and Grievant should follow behind him as the second truck. While the Crew Leader was walking towards the remaining trucks, Grievant pulled out from the side of the road and began driving towards the emergency site. The Crew Leader quickly told the other truck drivers to begin traveling towards the emergency site. It was important for the trucks to arrive as a group so that they could effectively block off several highway lanes.

Even though Grievant's truck did not have tools in it, Grievant parked the truck right in front of the pothole. He got out and began assisting other employees who had arrived from other locations. Grievant placed cones and flares around the work zone. A few minutes later, he got back into his truck and began watching for traffic. As the three other trucks arrived at the emergency site, the Crew Leader parked his truck as the second truck behind Grievant's truck and to the right of Grievant's truck several hundred feet back. Because the Crew Leader's truck was the second truck from the pothole, employees had to walk an additional 300 feet to retrieve tools. As the employees in the other trucks began working to repair the pothole, several began to question why Grievant was sitting in his truck and not assisting. One employee went to Grievant's truck and asked him why he was sitting in the truck. Grievant responded that he was watching for traffic. The employee then asked Grievant to get out of the truck and assist the other employees. Grievant did so.

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).¹ 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).

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that

¹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant knew he was supposed to be part of the team responding to the emergency. Based on his experience in working with repair crews, he knew or should have known that it was unnecessary for him to remain in the lead truck watching for traffic. Assuming watching for traffic had been necessary, the trucks most distant from the work area would be used to sit and watch for traffic. This is because those trucks would be positioned farthest from the work area and would be in position to first observe stray vehicles mistakenly approaching the work zone. Drivers in those trucks could then radio employees ahead or blow the horns on their vehicles to alert employees of possible danger. By sitting in the lead truck, Grievant would be in the least preferable position to watch for traffic. Grievant failed to begin assisting the other employees and increased their workload for a short period of time as well as increased their frustration with Grievant's work attitude.

The Agency contends Grievant should receive a Group II Written Notice for failure to perform assigned work.² The Agency presented evidence suggesting it had counseled Grievant in the past regarding his work attitude and resistance to direction from his supervisors. Unsatisfactory work performance may rise to a Group II Written Notice based on aggravating factors. Those aggravating factors, however, must directly relate to the events giving rise to the disciplinary action. Prior counseling is not in itself an aggravating factor. Accordingly, Grievant's behavior rises no higher than a Group I offense for unsatisfactory work performance.

Grievant contends that he sat in the truck to watch for traffic because doing so was reasonable under the circumstances in order to protect other employees. He adds that he exited the truck once instructed to do so and began working with the other employees. Based on the evidence presented, however, it is more likely that if it was necessary for an employee to watch out for traffic, that employee would have been in the last truck and not the first one.

Grievant argues he is being treated inconsistently because in another emergency road repair, an employee stopped working and sat in the truck, yet that employee was not disciplined. The evidence showed, however, that the employee sat in the truck only after working and becoming ill such that he could no longer work. The Agency has not inconsistently disciplined its employees.

DECISION

² Although Grievant disregarded the Crew Leader's instructions to follow after the Crew Leader, the Agency did not rest its disciplinary action on that fact. Had it done so, the Agency would have drafted the Written Notice to say "failure to follow a supervisor's instructions" and not "failure to perform assigned work."

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice.

APPEAL RIGHTS

You may file an administrative review request within **15 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 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 15 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 15-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.³

³ 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].

Carl Wilson Schmidt, Esq.
Hearing Officer