

Issue: Group III Written Notice with suspension, demotion and pay reduction (violating safety rules where there is a threat of physical harm and unsatisfactory job performance); Hearing Date: 05/20/05; Decision Issued: 05/26/05; Agency: DGIF; AHO: David J. Latham, Esq.; Case No. 8041



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 8041

Hearing Date: May 20, 2005  
Decision Issued: May 26, 2005

PROCEDURAL ISSUE

During the hearing, the agency raised an issue (grievant's radio became inoperable and he had to borrow the male game warden's radio) not mentioned in the Written Notice. Because the agency did not specify this issue in the Written Notice, it was not grieved. Only those issues specifically charged in the Written Notice and subsequently grieved are subject to adjudication in the grievance hearing.

APPEARANCES

Grievant  
Attorney for Grievant  
Two witnesses for Grievant  
Chief of Law Enforcement  
Attorney for Agency  
Three 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 for violating safety rules where there is a threat of physical harm, and for unsatisfactory work performance.<sup>1</sup> As part of the disciplinary action, grievant was suspended for seven days and demoted from Lieutenant to Game Warden with a pay reduction of ten percent. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup> The Department of Game and Inland Fisheries (DGIF) (Hereinafter referred to as "agency") has employed grievant for 16 years. He was a lieutenant at the time of the disciplinary action.

The Army Corps of Engineers planned to detonate explosives in order to breach a dam. Several governmental agencies were involved in the planning for the breaching operation in order to assure that it could be conducted safely. DGIF was assigned a role in patrolling areas around the dam to assure that everyone was kept out of the area at the time of detonation. The Virginia State Police planned to utilize a helicopter to patrol the dam area prior to detonation to help spot any unauthorized people near the detonation site. Grievant was assigned to supervise two game wardens and the three were to utilize all-terrain vehicles (ATVs) to patrol the wooded area on the north side of the dam.<sup>3</sup> At some point during planning of the operation, a suggestion was made to the DGIF chief of law enforcement (a colonel) that the game wardens should wear blaze orange baseball-type caps so that the state police observer in the helicopter would be able to distinguish between authorized people and unauthorized civilians. The colonel directed the captain who was DGIF's point man for the operation to instruct the six ATV operators to wear blaze orange caps.<sup>4</sup>

The captain thought about the law that requires ATV operators to wear a helmet but he did not discuss it with anyone.<sup>5</sup> Early in the morning of February 23, 2004, the captain conducted a briefing of all agency employees who had been assigned to the operation. After the captain instructed the ATV operators to

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<sup>1</sup> Agency Exhibit 3. Group III Written Notice, issued November 16, 2004.

<sup>2</sup> Agency Exhibit 22. Grievance Form A, filed December 13, 2004.

<sup>3</sup> A similar three-person team was assigned to the area on the south shore of the river.

<sup>4</sup> See Agency Exhibit 10. Interview with the Chief of Law Enforcement, March 3, 2004. The colonel denied knowledge of the law requiring ATV operators to wear helmets.

<sup>5</sup> Va. Code § 46.2-915.1.A.3 states "No all-terrain vehicle shall be operated by any person unless he is wearing a protective helmet of a type approved by the Superintendent of State Police for use by motorcycle operators."

wear blaze orange hats, grievant raised a question about wearing helmets.<sup>6</sup> The captain responded that those who wanted to wear helmets could wear a blaze orange vest in lieu of the blaze orange cap. It was clear from the discussion that the captain gave the employees the option of wearing either the orange cap, or a helmet and orange vest. All six ATV operators opted to wear orange caps.

Game wardens receive ATV training when hired.<sup>7</sup> The training covers vehicle operation and instruction about the helmet law. Grievant and both of his team members received this training. The male game warden assigned to grievant's team is very experienced in ATV operation; grievant is less experienced; the female game warden on the team was the least experienced. She is significantly smaller than grievant and the other team member, and was not able to physically "manhandle" the ATV as well as the two males.

Grievant and his team began patrolling their assigned area around 8:00 or 9:00 a.m. As they patrolled, it became evident to grievant that the female game warden was not as proficient an ATV operator as either he or the other game warden. She appeared to have more difficulty in making sharp turns, negotiating the ATV over logs, and in negotiating steep hills. Grievant attributed this to her relative inexperience on an ATV and to her smaller physical size.

The detonation was scheduled for noon. One detonation occurred at about that time but the engineers determined that not all of the explosives had detonated. After an hour or so, a second detonation was triggered and then the event was declared over. Once an "all clear" had been given at about 3:00 p.m., grievant and his team were released from patrolling the dam area. The three team members mutually agreed to ride their ATVs upriver from the dam site in order to familiarize the two game wardens with the ATV trails in that area, and to give the female additional ATV operation experience. Afterwards, the team rode back to the dam and then towards the parking area where their SUVs and ATV trailers were located. As they passed the dam, the two game wardens rode on ahead. Grievant stopped at the dam site for a moment to take two snapshots of the dam with his personal camera.

Meanwhile, the two game wardens had ridden ahead and reached a steep hill. The male game warden was able to easily negotiate the hill and rode to the top. The female game warden was not confident of her ability to negotiate the hill and did not immediately attempt to go up. The male game warden explained the techniques necessary to ascend the hill and encouraged her to try. The female made the attempt but over accelerated as she ascended causing the ATV to upend. She fell off and the ATV fell backwards on her resulting in several injuries, the most severe of which was a brain injury.

The agency investigated the accident and interviewed employees during the next several days. Because of the female warden's injuries, she could not be

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<sup>6</sup> Agency Exhibit 22. Affidavit of grievant, February 3, 2005.

<sup>7</sup> See generally Agency Exhibit 11. ATV Training material, September 2000.

interviewed until late June 2004. The agency disciplined grievant on November 16, 2004. The agency removed from employment the male game warden who encouraged the female to attempt to negotiate the steep hill. The captain who gave the ATV operators the option to not wear helmets received a Group I Written Notice. The lieutenant supervising the team on the south side of the river was also disciplined because he did not require his team to wear helmets.

### 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.<sup>8</sup>

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

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<sup>8</sup> § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

misconduct and to provide appropriate corrective action. Section V.B.3 of the Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. Violating safety rules where there is a threat of physical harm is an example of a Group III offense.<sup>9</sup> Unsatisfactory work performance is a Group I offense.

#### Violating safety rules where there is a threat of physical harm

The grievant acknowledges that on February 23, 2004, he operated his ATV without a helmet, and those under his supervision did the same. Operation of an ATV without a helmet constitutes a rule violation, and increases the threat of physical harm in the event of an accident. The remaining issue is what discipline is appropriate for this offense, given the unique circumstances of this case. This was probably a one-time event for all those involved. The blowing up of a dam with observers hovering overhead in a police helicopter is something that occurs very infrequently. This was a new and unusual experience for the participants. In such situations, it is not uncommon that circumstances dictate following different procedures than one utilizes in day-to-day work.

It is undisputed that the instruction to wear ball caps originated (at least within this agency) with the Chief of Law Enforcement. Although the Chief of Law Enforcement denies knowing about the helmet law, a person in his position certainly should have known about this law, especially since the agency owns and operates a large number of ATVs. The Chief of Law Enforcement was not disciplined. The captain who instructed grievant (and the other ATV operators) to wear ball caps in lieu of helmets knew about the helmet law. When the captain questioned his superiors about the helmet issue, they said that game wardens could be given an option to wear helmets or not. The captain's superiors were not disciplined. Grievant was given a Group III Written Notice because he allowed two people under his supervision to wear ball caps. However, the captain who issued the instruction to *six* people to wear ball caps received only a Group I Written Notice. The agency offered no explanation as to why the grievant's discipline for this specific offense was so much greater than the captain's discipline.

When given the instruction to wear ball caps, grievant was the sole person who raised a question about helmets. The captain responded that the decision not to wear helmets had been "up and down the chain of command and been approved."<sup>10</sup> At this point grievant reasonably relied on the representation of his superior officer that an exception had been approved by agency's upper management. It is true that grievant could have exercised the option to wear a helmet with orange vest. In fact, it would have been prudent for him to have done so. However, grievant could not have **required** those under his supervision

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<sup>9</sup> Agency Exhibit 1. Section V.B.3, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

<sup>10</sup> Agency Exhibit 22. Grievant's affidavit, February 3, 2005.

to wear helmets because a superior officer had already instructed them that ball caps were permissible and that the chain of command had approved the instruction. Thus, even if grievant had worn a helmet himself, it would not have prevented either the accident or injuries to the female game warden.

Accordingly, the totality of the facts in this case support a conclusion that grievant's offense of not wearing a helmet was no greater than that of the captain. Both grievant and his captain relied on the representations of agency upper management that the issue of helmets had been considered, reviewed, and that an exception was permissible on this one occasion. When one is told that the agency's chief law enforcement officer and other superiors approved the exception, it is reasonable that subordinates will rely on that assurance.

#### Unsatisfactory work performance

Grievant has acknowledged that, during the morning of February 23, 2004, he became aware of the female game warden's inexperience and shortcomings in ATV operation. The agency infers that he should not have allowed her to continue on the patrol after recognizing these problems. The evidence reflects that the female game warden's problems were due in part to her smaller physical size, and in part to her relative inexperience on an ATV. However, grievant knew that, like all game wardens, she had passed an ATV training course after being hired. Thus, he knew that she had sufficient experience and skill to satisfy the ATV instructor who had trained her. Making a decision about whether she should have been taken off the patrol would have required a subjective judgement by grievant. Since grievant and the other male game warden were the only ones to actually observe her operational skills and abilities on the day in question, they were in the best position to make such a judgement. One cannot necessarily conclude solely on the basis of the accident that grievant made an incorrect judgement.

On the other hand, the evidence suggests that grievant could have kept a more watchful eye on the female as the day progressed. Recognizing her inexperience and smaller size, grievant could have followed her at the end of the day rather than stopping to take a picture. It is possible that, had grievant arrived at the steep hill with her, he might have concluded that she should not attempt to ascend but instead take a more round-about route back to the parking area. The female had complained that her ATV was not turning properly, suggesting that there may have been some sort of mechanical problem. While grievant could not necessarily be expected to diagnose the problem, that complaint, combined with his observations of her lack of skill, should have heightened his concern and attention to her operation of the ATV. Given these factors, it is reasonable to conclude that grievant's failure to more closely monitor his subordinate constituted unsatisfactory work performance – a Group I offense.

## Retaliation, coercion, and intimidation

Grievant requested as part of his relief that upper management cease retaliation, coercion, and intimidation. During the hearing grievant failed to offer any evidence or testimony to support these allegations. Because grievant failed to prosecute the allegations, and because no evidence supports the allegations, they will not be addressed herein. However, grievant and the agency are on notice that grievant may ask the Department of Employment Dispute Resolution (EDR) to investigate any allegations of retaliation, coercion, or intimidation that occur from this point forward as a result of participation in this grievance hearing. In the event of such an allegation, EDR will take appropriate actions as specified in the Grievance Procedure Manual.<sup>11</sup>

## Summary

It is unfortunate that another employee sustained such a severe injury. However, the fact is that if she had *not* sustained an injury as a result of the accident, it is entirely possible that there would not have been any disciplinary action issued to grievant. One cannot allow the seriousness of the injury to overshadow or adversely affect the appropriate level of discipline. Given that grievant's superiors approved the wearing of ball caps in lieu of helmets and issued that instruction in the presence of the entire group, a Group III offense against grievant is unsustainable. However, for the reasons discussed above, the preponderance of evidence supports a conclusion that grievant's supervision of the female game warden was not satisfactory.

## DECISION

The disciplinary action of the agency is modified.

The Group III Written Notice is REDUCED to a Group I Written Notice. Grievant is reinstated to the position of lieutenant, the seven-day suspension is rescinded, and grievant is awarded pay for the period of suspension as well as the difference in back pay between his current salary and his previous salary.

## 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.

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<sup>11</sup> §1.5, *Grievance Procedure Manual*, effective August 30, 2004.



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 14<sup>th</sup> St, 12<sup>th</sup> 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 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.<sup>12</sup> 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>13</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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David J. Latham, Esq.  
Hearing Officer

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<sup>12</sup> 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).

<sup>13</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.