

Issue: Group II Written Notice with termination (due to accumulation) (failure to follow supervisory instructions); Hearing Date: 05/31/05; Decision Issued: 06/03/05; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8056



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8056

Hearing Date: May 31, 2005
Decision Issued: June 3, 2005

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
(One of whom is grievant's father and was allowed to observe the remainder of
the hearing after he testified)
Human Resources Assistant
Representative 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

Grievant filed a timely grievance from a Group II Written Notice issued for failure to follow supervisory instructions.¹ Grievant was removed from state employment effective January 1, 2005 because he had an active prior Group III disciplinary action.² Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³

The Virginia Department of Transportation (VDOT) (Hereinafter referred to as “agency”) employed grievant as an administrative and office specialist for 15 years.⁴ Grievant was a toll collector on a state-owned toll road.

Toll collectors have been trained, and reminded in frequent safety meetings that, for their own safety, they should not leave their toll booth except in an emergency. Many patrons of the toll road purchase “Smart Tag” transponders that allow them to drive through a special lane and have the toll charged automatically. When transponders fail to work properly, patrons are required by the terms of their Smart Tag contract to pay the regular toll. Toll collectors are instructed that an agency priority is to keep traffic flowing as quickly as possible through the toll facilities. If there is a problem, toll collectors should obtain license numbers and let the patrons go.⁵ Collectors are instructed, again for their own safety, not to get into a confrontation with a patron because collectors are alone, unprotected, and do not know what the mental status of a patron may be.

On November 2, 2004, a patron of the toll road exited the toll road at the gate where grievant was on duty. The patron’s transponder failed to activate the gate mechanism. The patron stated that he had no cash with him. Grievant had seen this particular customer come through the toll gate on three previous occasions with the same excuse, i.e., transponder did not work and he had no cash. Toll collectors have been instructed in such situations to have the customer sign an IOU form and let them go. Grievant asked the patron for his transponder number but the customer did not give it to him. Grievant called the VDOT office; an employee directed grievant to take down the patron’s vehicle license number and let the customer go. Grievant exited the booth, obtained the vehicle license number, and let the patron go.

The patron sent an e-mail to the agency the following day complaining that grievant insulted and berated him by calling him an habitual offender.⁶ Grievant’s

¹ Agency Exhibit 7. Group II Written Notice, issued December 30, 2004.

² Agency Exhibit 9. Group III Written Notice, issued July 2, 2003 for sleeping during work hours. See also Agency Exhibit 8, Section VII.D.2 & 3, Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993 regarding accumulation of disciplinary actions.

³ Agency Exhibit 10. Grievance Form A, filed January 18, 2005.

⁴ Agency Exhibit 5. Grievant’s Employee Work Profile Work Description.

⁵ Testimony of grievant’s witness, the operations manager who conducts safety training for toll collectors.

⁶ Agency Exhibit 2. E-mail from patron to VDOT, November 3, 2004.

supervisor spoke with grievant about the incident. Grievant verified that the incident had occurred, although grievant denied insulting or berating the patron. The supervisor counseled grievant that in any future such incidents, grievant should not leave the booth but should instead jot down the license number and let the patron go.

On December 6, 2004, a different patron experienced difficulty with his transponder. The patron had not mounted his transponder in the correct location on his vehicle and waved it around attempting to activate the gate release mechanism. He asked grievant for assistance. A heated verbal exchange occurred between grievant and the patron. Grievant exited his booth and jotted down the patron's license number. The patron alleges that grievant grabbed his radio antenna and "snapped" it; grievant denies this allegation. The patron eventually paid his toll with coins and left the facility. Approximately 30 minutes later, a Virginia State Trooper came to grievant's booth because the motorist had complained to the State Police. The trooper asked grievant to write a memorandum of what had occurred; the trooper returned the following day and picked up the statement.

As a result of the December 6th incident, grievant was placed on administrative leave. During this time, grievant gave the agency a physician's note indicating that he was being treated for obstructive sleep apnea.⁷ The agency gave grievant additional time to obtain further documentation from his physician to determine whether this condition had any impact on the December 6th incident. The physician submitted a letter several days later but did not provide any information that related the condition directly to the incident.⁸ Accordingly, the agency determined that a Group II Written Notice for failing to follow instructions should be issued because grievant left his toll booth after being told less than one month earlier not to leave the booth when a patron becomes confrontational. The agency considered grievant's years of service as a potentially mitigating circumstance but because of a prior Group III offense, determined that grievant should be removed from state service due to the accumulation of disciplinary actions.

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

⁷ Agency Exhibit 10. Physician's note, December 13, 2004.

⁸ Agency Exhibit 10. Letter from physician, December 21, 2004.

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 her evidence first and must prove her claim by a preponderance of the evidence.⁹

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.2 of Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature, and are such that an accumulation of two Group II offenses normally should warrant removal from employment.¹⁰ Failure to follow supervisory instructions is one example of a Group II offense.

Although the agency acknowledged that, upon investigation, many patron complaints are determined to be unfounded, the two incidents described above did occur. In addition to the agency's written and testimonial evidence, grievant acknowledged that both incidents occurred on the dates stated. While grievant denies berating, insulting, and advancing on the patrons, he acknowledges that he was involved in confrontations with the two patrons. Accordingly, the agency has demonstrated by a preponderance of evidence that grievant became involved in two confrontations with patrons as described above.

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

¹⁰ Agency Exhibit 8. Section V.B.2, DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Grievant argues that he went out of his booth on December 6th because he had forgotten the verbal counseling he received in early November. He attributes his forgetfulness to conditions his physician diagnosed in December 2004, viz., diabetes, depression, and sleep apnea.¹¹ However, forgetfulness cannot excuse grievant's actions. The grievant knew from training conducted repeatedly over a long period of time that he should not have left his booth to confront the customer. An agency cannot allow forgetfulness to excuse offensive conduct, regardless of whether the forgetfulness was caused by a condition. If such an excuse were permissible, any employee who violates policy and procedures could allege forgetfulness to escape corrective action. If, as grievant's physician asserts, grievant's forgetfulness is attributable to his medical conditions, it is regrettable. But it also raises the question of what other procedures, practices, and job requirements grievant might forget in the future. The agency cannot afford to employ people whose memory is so affected that they are unable to remember repeated training they have received over a period of years.

Moreover, grievant had been verbally counseled by his direct supervisor less than one month earlier not to leave the booth when dealing with a confrontational customer. Grievant could have followed his supervisor's instructions by jotting down the vehicle license number as the patron drove away. Grievant's argument that he might not have written the number accurately as the patron left is not persuasive. Even if he would make a mistake on the license number, that is preferable to leaving the booth and possibly endangering himself or risking a more serious confrontation with the patron. The loss of a 25¢ toll is inconsequential when compared to the possibility that grievant could be injured or attacked by an irate customer.

It appears most likely from the totality of the evidence and testimony that grievant forgot the admonition not to leave his booth – not because of his medical conditions – but because he became distracted and overly involved in his zeal to extract a toll payment from the customer. While grievant's desire to obtain the correct toll from all patrons is commendable, the agency's goal is to strike a reasonable balance between collecting tolls, and maintaining smooth traffic flow and good customer relations. When one continues to engage a customer *after* that customer has become upset and confrontational, one is no longer accomplishing the goals of good customer relations and smooth traffic flow.

DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice issued on December 30, 2004 is hereby UPHELD. Grievant's removal from state employment effective January 1, 2005 is UPHELD.

¹¹ Grievant Exhibit 2. Letter from physician, April 8, 2005.

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. 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 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.¹² 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.¹³

¹² 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).

¹³ 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]

David J. Latham, Esq.
Hearing Officer