

Issue: Group I Written Notice with suspension (unsatisfactory job performance);
Hearing Date: 07/22/05; Decision Issued: 07/27/05; Agency: VDOT; AHO:
Anthony C. Vance, Esq.; Case No. 8132

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re: Case No. 8132

Hearing Date: July 22, 2005
Decision Issued: July 27, 2005

APPEARANCES

Grievant
One Witness For Grievant
Representative of Agency
Five Witnesses for Agency

ISSUES

Was the Grievant's conduct such as to warrant disciplinary action in the form of a Group 1 Written Notice and a five workday suspension? Was the punishment rendered excessive or unfair?

FINDINGS OF FACT

Grievant has worked for the VA Department of Transportation ("Agency") for 39 years and has been involved in snow removal operations since at least 1982 (HO EX 2)* . On Thursday, January 20, 2005, the snow supervisor for Grievant sent an e-mail to Grievant stating in part that "your services will be required for the upcoming snow." That e-mail also stated that Grievant would be notified of the plan of action closer to the weekend (EX A3). Other members of the snow removal team received a similar e-mail. Grievant's snow assignment was as a subdivision supervisor responsible for monitoring the work of snow removal crews and sand/chemical spreaders in an area of one County. On Friday, January 21, 2005, Grievant reported to his regular work location at the District Office and then left this office to attend a conference at approximately 11:30 AM. Grievant drove a VA State vehicle to this conference and departed at about 3:30 PM. Grievant drove a VA State vehicle to an adjoining District Office, left this vehicle in the parking lot there and then drove his personal vehicle to his home. There is a vanpool which leaves the District Office daily at 3:30 PM for Grievant's home area and it left on January 21, 2005 without Grievant. Grievant was aware that the vanpool would leave without him if he was not present to board the vanpool at 3:30 PM (EX A9).

Grievant's snow supervisor sent an e-mail to Grievant, and other team members, at 11:59 AM on Friday, January 21, 2005, which stated:

Please report to snow duty @ 7:00 a.m. Saturday morning. I will contact you if anything additional changes, such as the time to come in. Thanks for your help and support.
(Exhibit A-9 Attachment)

Grievant never received this January 21 e-mail message until Grievant reported for work on Monday, January 24, 2005 (EX A9, p.

* The Agency introduced into evidence 21 exhibits designated herein as EX A followed by exhibit number; Grievant introduced into evidence 10 exhibits designated herein as EX G followed by exhibit number; and the Hearing Officer introduced three exhibits of agreed or disputed facts by the parties, designated herein as HO EX followed by exhibit number. No objection was lodged to any exhibit by either party.

2). During the weekend of January 22-23, snow fell commencing at 10:30 AM on Saturday, January 22, and it snowed until about 7:00 PM that evening. Snow crews were released at 2:30 AM Sunday, January 23.* Grievant never received a call to report for snow duty at any time. When Grievant did not receive a call Saturday morning, January 22, 2005, Grievant believed he would not be called because he was not needed. On Saturday morning, Grievant drove his personal vehicle to visit his son. When Grievant returned home, there was no telephone message concerning snow duty. On Monday, January 23, 2005 Grievant drove his personal vehicle to the State parking lot, picked up a State car, and drove to work at the District Office where he found the e-mail of 11:59 AM, Friday, January 21st (EX A9, p. 3).

Grievant's snow supervisor stated that Grievant was called at his office, his home, and his VDOT cell phone number, but received no answer (EX A9, p. 3; EX A20). Grievant denies any responsibility to call his snow duty supervisor either Friday, January 21st46088 12o.0000iiiTmi stated that rning snow

On March 2, 2005, a Notice of Intent to File a Group II Written Notice for misuse of a State vehicle was issued to Grievant who responded thereto on March 8, 2005, presenting information and argument in defense of his actions and in mitigation of the proposed disciplinary action of termination. It was determined that Grievant exercised poor judgment in failing to check with his Snow Duty Supervisor concerning the need for his services and the need for the State vehicle he drove from the his District office to an adjoining District Office, ostensibly for the purpose of using it for snow duty. It was concluded that Grievant's work performance in the circumstances was inadequate and unsatisfactory and he was issued a Group I Written Notice. He was suspended without pay for a period of ten days, which was subsequently reduced to five days (EX A21, Memo; HO EX2). The Grievant filed a timely grievance (EX A13).

In 2003, Grievant received a Group II Written Notice for misuse of a state vehicle, among others, in commuting from the District Office to his home after his work day was completed. This offense occurred thirteen days after a counseling session when Grievant was fully advised of the State vehicle use policy (EX A10, A15). The Assistant District Engineer testified herein confirming that State vehicles may not properly be used as Grievant instantly did, that the law in 2003, when Grievant received a Group II Written Notice for misuse of a State vehicle, was substantially the same as it is now, and that Grievant was counseled concerning the governing state vehicle use law in 2003.

Grievant did not testify under oath herein but did submit an unsworn statement in his closing argument denying culpability.

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 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.*

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.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 (1993) provides that Group 1 offenses include inadequate or unsatisfactory work performance (EX A4, pp. 5-6).

Grievant argues that he had no responsibility to contact his snow supervisor before leaving the area to see his son in Richmond. Grievant agrees that he received notice that his services would be required for the "upcoming snow". He was advised of this some two days before leaving for Richmond. He was also expressly advised before noon on Friday, January 21st when to report for snow duty the morning of Saturday January 22nd, but denies receiving this message. Grievant, as a supervisor, should have his telephones operable so he can receive official messages. Grievant was placed on notice that his services would be required, that snow was imminent, and in the circumstances a prudent supervisor would certainly call his supervisor before departing the area to confirm that he was not needed, especially when snow started to fall at 10:30 AM Saturday. Grievant never testified herein. He offered no evidence as to when he left the area for Richmond on Saturday, nor did he offer evidence that he heard no snow forecast by radio or television. Clearly, Grievant exercised poor judgment in

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

failing to check with his Snow Duty Supervisor about the continuing need for his services or of his intent to leave the area. I conclude that Grievant indeed had a responsibility to contact his Snow Duty Supervisor before leaving for the weekend and that such failure in the circumstances constituted inadequate or unsatisfactory work performance.

With reference to Grievant's use of a State vehicle in traveling to an adjoining District Office on Friday, January 21st in anticipation of working snow duty that weekend, the evidence herein makes it very clear that Grievant was not authorized to so use a State vehicle. Grievant was counseled in 2003 concerning the governing rules pertaining to the use of State vehicles, after receiving a Group II Written Notice for misuse of a State vehicle. Grievant knew or should have known that his State vehicle usage from his District Office to the another District Office, ostensibly for snow duty, was improper. Grievant's reliance on outdated policy or opinions to the contrary by those not in an authoritative position concerning State vehicle use are misplaced and do not mitigate his violation. Grievant's instant vehicular violation is substantially similar to the type of incident for which Grievant was disciplined in 2003, as the Assistant District Engineer's testimony herein makes clear. I conclude that Grievant's conduct in this regard also represents inadequate or unsatisfactory performance.

In summary, Grievant's performance in misusing a State vehicle and failing to check with his Snow Duty Supervisor before departing the area where he was to supervise snow removal services warrant the issuance of the Group I Written Notice which he received.

Lastly, with reference to whether the issuance of a Group 1 Written Notice and five day suspension was excessive, I find that excessive punishment was not extended here, particularly because Grievant was expressly notified in advance that his snow supervisory services would be needed and because Grievant had past experience and earlier received counseling concerning state vehicle policy pertaining to the misuse of State vehicles. I agree with the earlier determination in the 4/21/05 attachment to Grievant's Group 1 Written Notice (EX A21), namely, that the misconduct at issue here, coupled with Grievant's supervisory role as an Assistant District Section Manager, warrant the determination that "normal" Group 1 offenses are not involved here, and that the imposition of a five day suspension is not unreasonable.*

*Grievant has not included in his "Disputed Factors" listing (HO EX1) his earlier contention (EX G5) that others have committed similar offenses but have not been disciplined. I find this contention to be without merit since

Therefore, I deny removing the Group 1 Written Notice offense and the five day suspension, and awarding lost back pay and benefits, as requested by Grievant.

In summary, I find that the Agency has, by the preponderance of the evidence, carried its burden of proving a Group 1 Written Notice was properly issued here and that the five day suspension awarded was measured and reasonable.

DECISION

The disciplinary action of the agency is affirmed.

The Group 1 Written Notice issued on March 18, 2005 is hereby affirmed.

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

none were involved in the misuse of a State vehicle, as Grievant was, and there is no evidence of record concerning their fact patterns.

grievance procedure with which you believe the decision does not comply. Address your request to:

Director
Department of Employment Dispute Resolution
830 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.* 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.**

Decision Issued: July 27, 2005

Anthony C. Vance, Esq.
Hearing Officer

* 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).

** Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.