

Issue: Group III Written Notice with suspension (violating safety rule where there is a threat of bodily harm); Hearing Date: 11/14/05; Decision Issued: 11/23/05; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8204; Outcome: Agency upheld in full



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8204

Hearing Date: November 14, 2005
Decision Issued: November 23, 2005

PROCEDURAL HISTORY

On August 23, 2005, Grievant was issued a Group III Written Notice of disciplinary action with ten workday suspension for:

Violating a safety rule where there is a threat of bodily harm, by not following policy and/ or following safety rules. A trench collapsed causing injury to an employee.

On September 19, 2005, 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 October 24, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 14, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUE

Whether Grievant's actions warrant disciplinary action under the Standards of Conduct? If so, what is the appropriate level of disciplinary action?

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 Transportation Maintenance Superintendent at one of its Facilities. The purpose of his position is: "Keeps Virginia moving in the supervision of highway maintenance."¹ He has been employed by the Agency since May 30, 1972. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

Grievant works independently. His duties include scheduling and directing the activities and personnel in work units for maintenance projects. He reports to the TOM III who reports to the Assistant Resident Engineer (ARE). Grievant typically receives his assignments from the TOM III and on occasion from the ARE in the form of a work order identifying the location and the task to accomplish. Which employees are to be assigned to the job and the nature of the work is left to Grievant's discretion. The Maintenance Supervisor reports to Grievant. Grievant may have several maintenance projects in progress at any given time. Each project would have a maintenance supervisor. Crewmembers report to the Maintenance Supervisor. Grievant conducts a safety meeting with his staff on a daily basis.

On August 10, 2004, a VDOT crew went to a location near a heavily traveled highway to remove portions of an existing pipe that had broken and to install new pipe to eliminate the risk of flooding from the broken pipe. In order to install the new pipe, the VDOT crew had to use heavy equipment to dig a trench several feet deep to uncover the damaged pipe. The walls of the trench were straight down and not sloped. Mr. DC stood inside the trench and was working on the pipe. The side of the trench began to cave-in and several inches of dirt surrounded Mr. DC's feet and legs. Mr. DC

¹ Agency Exhibit 7C.

asked for an ambulance to take him to the hospital, but Agency employees transported him in a VDOT pickup truck. Grievant received a telephone call from the Assistant Resident Engineer informing him of the cave-in. The accident was a topic of much discussion among Agency employees. Grievant knew of the cave-in and how it occurred. No disciplinary action was taken against any of the employees involved in the accident.

On July 20, 2005, Grievant received a call from the ARE informing Grievant that another piece of the pipe needed to be replaced at the site where the VDOT crew had installed pipe in August 2004. The ARE told Grievant that he needed to fix 160 feet of the pipe. Grievant asked the ARE if he needed anything special on the project and the ARE said "no."

Grievant spoke with the Maintenance Supervisor and mentioned the 2004 accident. Grievant read portions of the OSHA law and understood it to say that if the trench was 5 feet or more deep, then a trench box or shoring was required with the approval a Professional Engineer. If the trench was less than 5 feet deep, the project needed a Competent Person to look at the trench.

Work began early in the morning on July 21, 2005. Grievant visited the site at approximately 9:30 a.m. or 10:00 a.m. He spoke with the men working at the site and they did not report any concerns. Grievant left the site to attend to other matters. The trench was dug straight down with a truck mounted excavator. The trench walls were not sloped. Between 3:45 p.m. and 4:00 a.m.², the bank of the trench began to crumble and a portion of the trench caved-in.³ Mr. DC was standing in the trench when the cave in occurred. The dirt filled as high as his calves pinning him inside the trench. Two employees used hand-tools to remove Mr. DC from the filled dirt. An ambulance was summonsed and Mr. DC was transported to a local hospital. He was then transferred to a local hospital. Mr. DC was out of work for approximately one and a half months due to injuries suffered during the cave-in.

The Maintenance Supervisor received a Group III Written Notice with a ten workday suspension. Mr. DC received a Group I Written Notice for the July 21, 2005 accident. Two other crewmembers received Group I Written Notices that were reduced to counseling memoranda.

CONCLUSIONS OF POLICY

² At approximately 2:30 p.m. or 3:00 p.m. a smaller cave-in occurred. It is not clear whether the Maintenance Supervisor was present when that cave-in occurred. The Maintenance Supervisor was present when the second cave-in occurred.

³ Crewmembers used plywood to prevent sand from filling the trench. The sand had been placed near the pipe as part of the August 2004 repairs. Crewmembers did not use plywood near the area where the cave-in occurred since that portion of the pipe had not been repaired in August 2004 and sand was not present.

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).⁴ 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).

The Virginia Department of Transportation expects its employees to comply with the U.S. Department of Labor, Occupational Safety & Health Administration regulations governing excavations. OSHA regulations are part of the Agency’s safety rules. OSHA regulation 29 CFR § 1926, Subpart P, Appendix F sets forth a graphic summary of the requirements contained in OSHS regulations. This section asks, “Is the excavation more than 5 feet in depth?” If the answer is “no”, then the question becomes “Is there potential for cave-in?” If the answer is “yes”, then “Excavation must be sloped, shored, or shielded.”

The trench was less than 5 feet in depth. Grievant knew the potential for cave-in existed because the trench caved-in 11 months earlier. Grievant was responsible for making sure his employees were aware of and complied with safety regulations. Grievant was in a position to direct the work activities of the Maintenance Supervisor. Grievant took no action to ensure that the trench was sloped, shored, or shielded. Grievant failed to comply with OSHA regulations governing excavations.

“Violating safety rules where there is a threat of physical harm” is a Group III offense.⁵ By failing to comply with OSHA regulations, Grievant failed to comply with safety rules. A threat of physical harm existed and was known to Grievant. Accordingly, the Agency has presented sufficient evidence to support its issuance of a Group III Written Notice. A ten workday suspension is permitted upon the issuance of a Group III Written Notice. The Agency’s action must be upheld.⁶

Grievant argues that because the trench was less than 5 feet, all he had to do was have a Competent Person⁷ at the work site. An employee working in an excavation must be protected from cave-ins by an adequate protective system except when

⁴ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁵ DHRM Policy § 1.60(V)(B)(3)(f).

⁶ No credible evidence was presented to justify mitigation of the disciplinary action in accordance with the *Rules for Conducting Grievance Hearings*.

⁷ On July 14, 2003, Mr. DC received training to be a Competent Person under the OSHA regulations. Grievant knew Mr. DC had received excavation training but did not know Mr. DC was considered to be a Competent Person.

excavations “are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.”⁸ Merely having a Competent Person on the work site was not sufficient to comply with OSHA’s regulations. The Competent Person must perform an examination of the ground that reveals no indication of a potential cave-in. No evidence was presented suggesting a Competent Person performed an examination of the ground. Had he performed an examination of the ground he would likely have concluded the risk of cave-in existed to the same degree as it existed in August 2004 when the same ground caved-in. Thus, with the risk of a potential cave-in identified, an adequate protective system should have been utilized.

Grievant had the discretion to determine how the project was to be completed. He was familiar with location of the project and the risks that crew members would face. He also knew of the injury to Mr. DC that occurred in August 2004. Grievant knew that OSHA regulations governed the excavation. He reviewed the regulations but failed to fully implement those regulations.

Grievant argues that the disciplinary action was excessive given that little disciplinary action was taken against managers higher in his chain of command. The TOM III was counseled but did not receive any disciplinary action. No evidence was presented regarding disciplinary action against the ARE. Based on the evidence presented, Agency managers above Grievant could have done a better job to plan to avoid repeating the August 2004 cave-in. However, the degree of discretion necessary to execute the project was almost entirely Grievant’s.⁹ The TOM III and ARE were responsible for assigning the project, but they were not responsible for determining the details of that assignment. The disparity of responsibility justifies the Agency’s distinction between Grievant and the TOM III and ARE.

Grievant argues that he should not be disciplined for the July 2005 cave-in because no one was disciplined for the August 2004 cave-in. The August 2004 cave-in and July 2005 cave-in occurred similarly but were not the same event. There was no obvious warning of danger prior to the August 2004, but there was overwhelming evidence of danger prior to the July 2005. The occurrence of the August 2004 cave-in is what made the July 2005 cave-in preventable. The Agency has not taken inconsistent disciplinary action by failing to discipline employees for the August 2004 excavation but taking disciplinary action for the July 2005 accident.

Grievant argues the Agency took too long to take disciplinary action. Grievant’s argument fails because the delay was caused because of the Agency’s investigation and its deliberative process.

⁸ 29 CFR § 1926.652(a)(ii).

⁹ Although Grievant asked the ARE if any special equipment was needed, this action was inadequate to exculpate Grievant from his responsibility for the accident. Asking for special equipment is not the same as questioning whether the Agency needs to take specific actions to avoid injury to employees at a dangerous work site.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with suspension is **upheld**.

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.¹⁰

[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

¹⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.