

Issue: Group II Written Notice with termination (due to accumulation) (violating safety rules); Hearing Date: 11/21/05; Decision Issued: 12/07/05; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8205; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8205

Hearing Date: November 18, 2005
Decision Issued: December 7, 2005

PROCEDURAL HISTORY

On July 25, 2005, Grievant was issued a Group II Written Notice of disciplinary action with removal for violating safety rules where there is not a threat of bodily harm. On August 22, 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. The Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 18, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representatives
Agency Party Designee
Agency Representative
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

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 employed Grievant as a Transportation Operator II at one of its Facilities. Grievant began working for the Agency on March 10, 2001. His removal was effective July 25, 2005. The purpose of Grievant's position was to "operate highway maintenance equipment and perform physically demanding work to preserve and maintain roadway assets."¹ Grievant received favorable evaluations from the Agency during his employment. On November 2, 2004, Grievant received a Group II Written Notice with three workday suspension for failure to comply with established written policy because he did not contact the State Police or his supervisor following an incident with a State vehicle.

On July 21, 2005, Grievant was operating a VDOT truck² near a parking lot. The skies were clear and the temperature was approximately 95 degrees. He wanted to move the truck to another work area. He got into his truck and fastened his seat belt. Grievant pulled forward from his parked position. He could not continue forward because if he did so he would run over and ruin freshly placed asphalt. He stopped his

¹ Grievant Exhibit 1.

² Grievant was operating a distributor truck which sprayed oil.

truck, sounded his horn, and began backing up. He misjudged the distance between his vehicle and the truck parked immediately behind his vehicle. The right rear of his vehicle hit the front left bumper of the other vehicle. Grievant's vehicle stopped abruptly. A control box attached to his vehicle was dented.

Several employees were within fifty feet of Grievant before he backed up the truck. None of those employees offered to assist Grievant by serving as spotters because they were performing other tasks. Grievant did not ask for any assistance from anyone before backing up.

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).³ 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).

On January 5, 2000, the District Administrator issued a memorandum to staff stating, in part, "Safety must be the first and foremost overriding criteria for both the traveling public we serve and our employees. Our work must start with safety, continue with safety throughout all our operational tasks, and end with safety."⁴

On March 12, 2001, the Agency implemented a Vehicle Backing Policy. This policy provided:

1. Any vehicle that has an obstructed view to the rear must use a ground-backing guide.

This includes not only the vehicles with a GTW of 10,000 pounds but any small vehicle with a permanent obstruction, such as a mechanic's truck, or with a temporary obstruction such as an inspector's pickup with a radiation gauge box in the back, etc.

It is both the driver's responsibility as well as those available to act as Guides to see that this policy is followed.

³ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

⁴ Agency Exhibit 11.

2. If a ground guide is unavailable, the driver must first walk around the vehicle to check for any backing hazards.

3. All vehicles, both private and state-owned, in residency parking areas must be backed into spaces. All state vehicles must be backed into spaces in any parking area.

To demonstrate the residency's commitment to the backing policy, the traffic flow in the residency office parking lot will be altered to allow for parking in the slanted spaces.

4. Failure to follow this policy will result in immediate disciplinary action.⁵

"Violating a safety rule where there is not a threat of bodily harm" is a Group II offense.⁶ The Agency's Vehicle Backing Policy is a safety policy.⁷ Grievant was operating a vehicle with an obstructed view to the rear. He was obligated to comply with the Vehicle Backing Policy. Grievant did not ask anyone else to serve as a ground-backing guide. Another employee was nearby. Grievant could have asked that employee to assist him, but Grievant chose not to do so. By failing to seek the assistance of a nearby employee to serve as a ground-backing guide, Grievant acted contrary to the Agency's safety rule. The Agency has presented sufficient evidence to support its issuance of a Group II Written Notice.

Upon the accumulation of a second active Group II Written Notice, an employee may be removed from employment. Grievant received a Group II Written Notice on November 2, 2004. With the Written Notice giving rise to this disciplinary action, the Agency has presented sufficient evidence to support Grievant's removal based on the accumulation of disciplinary action.

Grievant argues that the disciplinary action should be reduced because the nearby employee did not volunteer to be his ground-backing guide. No evidence was presented showing that the nearby employee knew Grievant intended to back up his truck and needed assistance. Grievant did not seek assistance from the nearby employee. The inaction of the nearby employee is not a sufficient basis to reduce Grievant's disciplinary action.

Grievant argues that the disciplinary action should be reduced because the Agency has not disciplined other employees involved in vehicle accidents. The EDR Rules for Conducting Grievance Hearings permits hearing officers to mitigate

⁵ Agency Exhibit 10.

⁶ DHRM Policy 1.60(V)(B)(2)(b).

⁷ Grievant knew or should have known of this policy.

disciplinary action if an agency inconsistently disciplines its employees. Grievant has presented evidence that other employees were not disciplined despite having been involved in vehicle accidents. Grievant has not been treated inconsistently, however, because he also had been involved in accidents without receiving disciplinary action. What separates Grievant from these other employees is the frequency of accidents involving Grievant. Grievant had four at fault accidents within approximately a one year period.⁸ No evidence was presented suggesting the other Agency employees not disciplined also had as many as four accidents within one year. The frequency of Grievant's accidents serves as an aggravating circumstance negating any mitigating circumstances.

Grievant presented a letter from a TOM II describing the disciplinary action taken against Grievant and stating, "I feel this was excessive action on the part of VDOT." Grievant wrote the letter and explained to the TOM II that the letter was intended to help Grievant obtain new employment. The TOM II testified that he did not actually agree with the statement, but signed the letter in order to help Grievant obtain other employment. Based on these facts, the Hearing Office gives little weight to the TOM II's letter.

Grievant argues that the disciplinary action was excessive. Under the EDR Director's Rules for Conducting Grievance Hearings, the Hearing Officer is not a "super-personnel officer." Therefore, in providing any remedy, the Hearing Officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy. In this case, the Agency's actions are consistent with law and policy.

Grievant contends he was counseled regarding the events giving rise to the disciplinary action and, thus, it was inappropriate for the Agency to issue a Written Notice. An Agency may both counsel and discipline employees.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal based on the accumulation of disciplinary action 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:

⁸ Grievant was involved in at fault accidents on July 12, 2004, October 26, 2004, December 12, 2004, and July 21, 2005.

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.⁹

[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.

⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Hearing Officer