

Issue: Group II Written Notice with suspension (failure to follow established written policy); Hearing Date: 06/21/06; Decision Issued: 06/22/06; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8360; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8360

Hearing Date: June 21, 2006
Decision Issued: June 22, 2006

PROCEDURAL HISTORY

On March 24, 2006, Grievant was issued a Group II Written Notice of disciplinary action with suspension from March 27, 2006 through March 28, 2006 for failure to follow established written policy. On March 31, 2006, 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 May 24, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 21, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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 employs Grievant as a maintenance crew member at one of its Residencies. Grievant began working for the Agency on September 10, 2002. No evidence of prior disciplinary action against Grievant was introduced during the hearing.

On March 15, 2006, Grievant began work at the Residency by attending a brief safety meeting. During the meeting, employees were reminded of the Agency's policy regarding backing up vehicles. Grievant was assigned a VDOT dump truck for the day. He drove the dump truck to an interstate highway. Mr. G was a passenger in Grievant's vehicle. Both employees were assigned to collect trash along the roadside and place the trash on the truck. Grievant had parked the truck parallel with the roadway while he worked along the roadway. He approached the truck from the rear and did not see any debris behind the truck. He entered the truck cab and started the engine. Mr. G also was inside the truck. Grievant looked at his rearview mirrors and did not see any obstructions. Grievant placed the truck gear into reverse and backed the truck a short distance. As he did so, the right rear tires rolled over a delineator post buried flat in the ground. Delineator posts are approximately four feet tall with a reflector at the top. One end of the post is buried into the ground. The post serves to mark the beginning of a road shoulder. This delineator post was likely knocked over and run over by heavy equipment on an earlier date. Once Grievant's truck tires rolled over one end of the

post, the other end angled upward. As the truck moved backwards, the elevated part of the post came into contact with a crossbar underneath the truck. This caused the post to bend into a "C" shape. The elevated part of the post struck the inside of the wheel fender creating a hole in the fender. Grievant heard the impact and stopped the vehicle. He observed the hole in the fender and the delineator post. He then drove to the residency office and informed his supervisor of what had happened.

Grievant's Supervisor called the Virginia State Police. A member of the Virginia State Police drafted a report describing the event.

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).¹ 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 September 10, 2002, Grievant received a copy of the Residency's Vehicle Backing Policy which stated, in part:

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

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

4. Failure to follow this policy will result in immediate disciplinary action.²

On September 10, 2002, Grievant read a memorandum from an Agency Executive describing the Agency's "Proper Use of State Owned Vehicles." The memorandum stated, in part:

If is the responsibility of the drive of any State vehicle to call the State Police in the event of an accident or incident that inflicts damage to the State vehicle or other property, regardless of how insignificant it may seem at the time.³

¹ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

² Agency Exhibit 11.

³ Agency Exhibit 13.

On July 3, 2003, Grievant received a memorandum from a Residency Manager stating, in part:

Over the course of the last year, there has been an alarming trend of both licensed and unlicensed equipment being damaged and not being reported. The Department policy is that all accidents, involving departmental equipment licensed or unlicensed, shall be reported to the State Police for investigation at the time of the accident, regardless of location or the amount of damage.⁴

“Failure to follow ... otherwise comply with established written policy” is a Group II offense.⁵ “Violating a safety rule where there is not a threat of bodily harm” is a Group II offense.⁶

Grievant’s truck had an obstructed view to the rear because part of the area behind him was not visible even though he used the truck side mirrors. The Agency’s safety rule required Grievant to use a backing guide to observe how Grievant backed up his vehicle. Grievant had a passenger with him but did not ask that passenger to serve as a backing guide. Grievant failed to comply with the Agency’s safety rule.

The Agency’s backing policy required Grievant to contact immediately the Virginia State Police to report damage to the dump truck he was operating. Grievant failed to report the damage to his vehicle to the State Policy thereby acting contrary to the Agency’s policy.

Because Grievant violated a safety rule and failed to comply with Agency policy, the Agency was justified in issuing Grievant a Group II Written Notice. A suspension of up to ten workdays is permitted upon the issuance of a Group II Written Notice. Since Grievant’s suspension was fewer than ten workdays, it must be upheld.

Grievant argues he looked behind the vehicle did not see the buried post. If Mr. G had spotted for him, Mr. G would not have seen the post either and the damage would have occurred anyway. Grievant’s argument fails because it is not necessary for the Agency to show that Grievant’s failure to comply with a safety rule resulted in the damage to the Agency. It is only necessary for the Agency to show that Grievant acted contrary to the safety rule, and the Agency has done so.

Grievant argues the State Police drafted an incident report not an accident report since no other vehicles were involved in the event. Thus, Grievant was not obligated to

⁴ Agency Exhibit 12.

⁵ DHRM § 1.60(V)(B)(2)(a).

⁶ DHRM § 1.60(V)(B)(2)(b).

report the matter to the State Police. Grievant's argument fails because the policy memorandum Grievant read and agreed to follow required him to call the State Police in the event of an "accident or incident" causing damage to a State vehicle.

Grievant contends the disciplinary action should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..."⁷ Under the EDR Director's *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to "consider management's right to exercise its good faith business judgement in employee matters. The agency's right to manage its operations should be given due consideration when the contested management action is consistent with law and policy." In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II 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

⁷ *Va. Code § 2.2-3005.*

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 all of your appeals to the other party and to the EDR Director. 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.⁸

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.