

Issue: Group III Written Notice with demotion (failure to obtain needed license);
Hearing Date: 10/17/06; Decision Issued: 10/18/06; Agency: VDOT; AHO: Carl
Wilson Schmidt, Esq.; Case No. 8432; Outcome: Employee granted partial relief;
Administrative Review: HO Reconsideration Request received 11/01/06;
Reconsideration Decision issued 11/02/06; Outcome: Original decision affirmed;
Administrative Review: EDR Ruling Request received 11/01/06; EDR Ruling No.
2007-1475 issued 11/20/06; Outcome: HO's decision affirmed; **Administrative**
Review: DHRM Ruling Request received 11/01/06; DHRM Ruling issued 04/23/07;
Outcome: Remanded to HO; Second Reconsideration Decision issued 04/25/07;
Outcome: Original decision reversed – Agency upheld in full; **Judicial Review:**
Appealed to the Circuit Court, Wise County, May 22, 2007; Outcome: DHRM
Ruling and AHO's remanded decision affirmed [CL07-306, issued 06/14/07).



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8432

Hearing Date: October 17, 2006
Decision Issued: October 18, 2006

PROCEDURAL HISTORY

On June 15, 2006, Grievant was issued a Group III Written Notice of disciplinary action with demotion and pay reduction for failure to obtain an inspector's license needed for his position. On July 14, 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 September 14, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 17, 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 employed Grievant as an Engineering Technician III until he was demoted to an Engineering Technician II on June 15, 2006. The purpose of his position was:

The Engineering Technician III provides a method to monitor contractors and provides a way to track the progress of construction projects. The Engineering Tech III is the liaison between the contractor, the property owner, and the ... Residency Office. This position insures that construction projects are constructed according to plans, specifications and contracts.¹

Grievant reported to the Engineering Technician IV who reported to the Area Construction Engineer.

In June 2001, Grievant's Employee Work Profile was amended to include a requirement that he obtain an Erosion and Sediment Control Inspector Certification. To obtain this certification, one must attend a two or three day class and pass a test. The training and test is administered two times each year by the Department of Conservation and Recreation.

¹ Agency Exhibit 12.

As part of Grievant's November 2005 evaluation, he was rated as Below Contributor for one of his Core Responsibilities because he "is not certified as an Erosion and Sediment Control Inspector as required"²

On April 20, 2006, Grievant met with the Area Construction Engineer to discuss the requirements of Grievant's position as an Engineering Technician III. The Area Construction Engineer told Grievant that his position required him to have an Erosion and Sediment certification from the Department of Conservation and Recreation. He told Grievant that the Agency was considering disciplinary action if he failed to take and pass the DCR exam. The Area Construction Engineer presented Grievant with a memorandum documenting their meeting.

In May 2006, Grievant attended the several day course offered by the Department of Conservation and Recreation. He took the final examination and failed to pass the test. This was the second time he had failed to pass the test. Because Grievant failed to pass the DCR test, the Agency issued Grievant a Group III Written Notice with demotion. Grievant had no prior active disciplinary action.

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).

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense.⁴ On April 20, 2006, Grievant was instructed by a supervisor, the Area Construction Engineer, to take and pass the Erosion and Sediment Control Inspector's class administered by the Department of Conservation and Recreation. Grievant took the test but did not pass. Grievant's did not comply with a supervisor's instruction because he did not pass the test and obtain his certificate from DCR. Accordingly, the Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice.⁵

² Agency Exhibit 12.

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

⁴ DHRM § 1.60(V)(B)(2)(a).

⁵ One could argue that Grievant attempted to comply with the instruction and simply failed to do so and, thus, his work performance was unsatisfactory. Unsatisfactory work performance is a Group I offense. In

DHRM Policy 1.60 does not authorize an Agency to demote an employee without prior active disciplinary action upon the issuance of a Group II Written Notice. Accordingly, the Agency's demotion of Grievant and salary reduction must be reversed.

The Agency argues it may demote Grievant because he lacks a certification required by his Employee Work Profile. Section IV(A) of DHRM Policy 1.60 authorizes removal due to circumstances such as an employee losing a certification required for a job. Section IV(C) specifically states that taking action against an employee pursuant to Section IV "should be via memorandum or letter, not by Written Notice form." By demoting Grievant using a Written Notice, the Agency failed to comply with Section IV(C).⁶

Grievant argues he complied with the terms of the Written Notice. On the face of the Notice it alleges Grievant failed to obtain the "VDOT Erosion and Sedimentation Control Certification". Grievant presented evidence showing he had obtained that VDOT Certification. As part of the attachment to the Written Notice, the Area Construction Engineer wrote Grievant "is required to obtain a certification in Erosion and Sedimentation Control for Construction Inspectors. This certification is required by the Department of Conservation and Recreation (DCR) on any earth moving project to ensure compliance with VDOT's Annual Submittal and the Virginia Erosion and Sedimentation Control Law and Regulations." On the face of the Written Notice, the Agency incorrectly described the certification for which Grievant failed to obtain. In the attachment, however, the Agency correctly described the required test. At the time the case was referred for hearing, Grievant knew that the Agency was disciplining him for failing to obtain the certification from DCR. Accordingly, the Agency has cured the error appearing on the face of the Written Notice.

There are no mitigating circumstances that would justify a reduction or removal of the disciplinary action. No credible evidence was presented suggesting Grievant was subject to workplace harassment.

this case, the Agency notified Grievant in 2001 that he needed to obtain the DCR Inspector's certification. The Agency scheduled Grievant for class in 2002, 2003, 2004, 2005 yet he did not take the class. Several of his absences were justified due to illness; however, in April 2004 and July 2005 Grievant was scheduled to take the class but did not do so even though he did not take annual or sick leave on the dates of the scheduled classes. Because the Agency has taken extraordinary measures to ensure Grievant obtain his certificate this failure to obtain the DCR inspector certification is best characterized as a Group II offense.

⁶ The Agency decided to issue Grievant a Group III Written Notice pursuant to Section V of DHRM Policy 1.60 in order to accomplish the goal of demoting him pursuant to Section IV of that policy. Nothing in DHRM Policy 1.60 authorizes the Agency's action. One Agency witness suggested that if the Agency had applied Section IV without considering Section V, it would have been forced to terminate Grievant from employment. The Agency did not wish to terminate Grievant from employment. Although that issue is not before the Hearing Officer, it is not clear that the Agency is prohibited from demoting Grievant pursuant to Section IV by sending him a letter and not issuing to him a Written Notice.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action is **reduced** to a Group II Written Notice. Grievant's demotion and salary reduction is **reversed**. The Agency is ordered to restore Grievant to his former position or, if occupied, to an objectively similar position. The Agency is ordered to provide Grievant with **back pay** representing the salary reduction resulting from the demotion.

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 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.⁷

[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

⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8432-R

Reconsideration Decision Issued: November 2, 2006

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

The Agency seeks reconsideration of the Hearing Decision because it asserts its issuance to Grievant of a Group III Written Notice was in accordance with guidance from DHRM and was consistent with treatment of others in VDOT who were in similar situations.

No one from the Department of Human Resource Management testified during the hearing. Regardless of such testimony, the Hearing Officer is governed by the facts that occurred and the DHRM policy as it is written. The Hearing Decision correctly applied DHRM Policy 1.60. Although the Agency contends it has treated other similar employees in the same manner as it treated Grievant, this would not form a basis to uphold disciplinary action at a Group III level when such discipline is not otherwise justified by DHRM Policy 1.60.

The Agency’s reconsideration argument continues to confuse the process of removing an employee because of lack of certification with the process of disciplining an employee for poor behavior. DHRM Policy 1.60 distinguishes between these two practices and clearly states that lack of certification does not result in a Written Notice being issued. Grievant’s ability to obtain and maintain a certification is not, in itself, a basis to take disciplinary action. The basis to discipline Grievant arises because of his failure to follow a supervisor’s instruction which is a Group II Offense, not a Group III offense.

The Agency argues that failing to obtain a required certification is of such seriousness as to warrant a Group III offense. There is nothing in the Standards of Conduct that would support this argument. If an employee who loses a necessary certification should not receive a Written Notice III, it is not logical to interpret the Standards of Conduct to justify issuing a Written Notice III to an employee who fails to obtain a required certification.⁸ In either case the employee does not have a required certification.

The Agency's request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the Agency's request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁸ Failing to obtain a required certification by itself would not justify any disciplinary action. Only if the failure is accompanied by a supervisor's instruction to obtain the certification and the employee fails to comply with that instruction would disciplinary action be appropriate.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Virginia Department of Transportation

April 23, 2007

The agency has requested an administrative review of the hearing officer's decision in Case No. 8432. The agency head of the Department of Human Resource Management has requested that I respond to this appeal.

FACTS

Prior to the disciplinary action that resulted in the demotion of the grievant to an Engineering Technician II, he was an Engineering Technician III with the work title of Senior Inspector. VDOT has made a business decision to designate Senior Inspectors as the staff members in charge of overseeing the implementation and inspection of the erosion and sediment plan for the regulated land disturbing activity of VDOT projects. This designation means that these employees are required to hold a certificate of competence issued by the Virginia Soil and Water Conservation Board. The certification requirement is substantiated by Virginia Erosion and Sediment Control Law (COV § [10.1-561](#)). Preparatory training and the certification exam are administered by the Department of Conservation and Recreation.

As set forth in the hearing decision, the purpose of the Engineering III position is:

“The Engineering Technician III provides a method to monitor contractors and provide a way to track the progress of construction projects. The Engineering Technician III is a liaison between the contractor, the property owner, and the... Residency Office. This position ensures that construction projects are constructed according to plans, contracts and specifications... In June 2001, Grievant's Employee Work Profile was amended to include a requirement that he obtain an Erosion and Sediment Control Inspector Certification. To obtain this certification, one must attend a two or three day class and pass a test. The training and test are administered two times a year by the Department of Conservation and Recreation. As part of the Grievant's November 2005 evaluation, he was rated as Below Contributor for one of his Core Responsibilities because he “is not certified as an Erosion and Sediment Control Inspector as required...”

Agency management has the authority to assign responsibilities to employees. Therefore,

it is VDOT's prerogative to assign the grievant charge responsibilities for erosion and sediment control inspections and to hold him accountable for acquiring and maintaining the required certification of competence.

On April 20, 2006, the grievant met with the Area Construction Engineer to discuss the requirements of the grievant's position as an Engineering Technician III. The Area Construction Engineer told the grievant that his position required him to have an Erosion and Sediment Certification from the Department of Conservation and Recreation. He told the grievant that the Agency was considering disciplinary action if he failed to take and pass the DCR exam. The Area Construction Engineer presented the grievant with a memorandum that documented the meeting.

The grievant attended the several day course offered by the Department of Conservation and Recreation and took the final examination but did not pass it. This was at least the second time the grievant had failed to pass the test. Because the grievant failed to pass the DCR test and to secure his certification, the agency issued to him a Group III Written Notice and demoted him to an Engineering Technician II position.

The grievant challenged the disciplinary action by filing a grievance. In his decision, the hearing officer reduced the disciplinary action to a Group II Written Notice and reversed the demotion, concluding, "Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy is a Group II offense. On April 20, 2006, Grievant was instructed by a supervisor, the Area Construction Engineer, to take and pass the Erosion and Sediment Control Inspector's class administered by the Department of Conservation and Recreation. Grievant took the test but did not pass. Grievant did not comply with a supervisor's instruction because he did not pass the test and obtain his certificate from DCR. Accordingly, the Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice."

The hearing officer further stated, "Policy 1.60 does not authorize an agency to demote an employee without prior active disciplinary action upon the issuance of a Group II Written Notice. Accordingly, the Agency's demotion of Grievant and salary reduction must be reversed."

The agency asked the hearing officer for a reconsideration decision and an administrative review from the Department of Employment Dispute Resolution (EDR). In his reconsideration decision, the hearing officer did not change his position and in its administrative review, EDR determined the issue to be one of policy interpretation and deferred the decision to the DHRM.

The relevant policy is the Department of Human Resource Management's Policy No. 1.60 that states it is the Commonwealth's objective to promote the well-being of its employees in the workplace and to maintain high standards of professional conduct and work performance. This policy also sets forth (1) standards for professional conduct, (2) behavior that is unacceptable, and (3) corrective actions that agencies may impose to address behavior and employment problems. Section V, Unacceptable Standards of Conduct, of that policy sets forth examples of unacceptable behavior for which specific disciplinary action may be warranted. The

examples are not all-inclusive. Agencies may supplement this policy as they need or desire, as long as such a supplement is consistent with DHRM Policy 1.60.

DISCUSSION

A hearing officer is authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited action constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. Any challenge to the hearing decision must cite the inconsistency in the interpretation or application of a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy or procedure.

VDOT officials contend that their application of policy in demoting the grievant and reassigning him to lower level duties was in accordance with guidance received from DHRM and was consistent with the treatment of others within VDOT who did not acquire certification.⁹ They also contend that DHRM staff advised VDOT staff that Section IV of Policy No. 1.60, Standards of Conduct¹⁰, did not apply here because the grievant did not *lose* certification for his job, rather he did not *acquire* it.

⁹ In summary, DHRM's guidance memorandum dated March 29, 2006, advised VDOT to consider "grandfathering" to allow an Engineering Technician III, Mr. W, to continue in his position because he had been exhibiting satisfactory performance. The memorandum also addressed the propriety of certification requirement was not a condition of employment when he was hired into the position in 1998 and had been exhibiting satisfactory performance. The memorandum also addressed the propriety of using Policy No. 1.60, Standards of Conduct. The referenced memorandum spells out instances where Section IV of the Standards of Conduct is applicable but does not list prohibitions. However, the chronology of events reveals that VDOT officials had decided to take disciplinary action against Mr. W prior to receiving DHRM's guidance memorandum. Therefore, the guidance memorandum, in part, is not probative to a determination in this matter.

¹⁰ Section IV of Policy 1.60 applies to removal of employees due to circumstances that prevent them from performing their jobs. More specifically, conditions that generally prevent employees from performing their jobs include (1) loss of driver's license that is required for performance of the job; (2) incarceration for an extended period; or (3) loss of license or certification required for the job. Section III of Policy 1.60 applies to disciplinary actions as related to attendance and job behavior and performance. In an earlier conversation between VDOT and DHRM staff, VDOT staff was advised that it was proper to apply the provisions of Section III of the Standards of Conduct to discipline another employee, Mr. W, who had not acquired his certification. Using that guidance, VDOT officials later applied the same disciplinary action to the grievant who is the subject of this administrative review. While Section IV of the Standards of Conduct policy is very specific on the steps to take if an employee loses a required certification, it is appropriate to take similar steps in the case where the employee does not acquire a mandated certification within the designated time period.

Probative to DHRM's determination in this case is the consideration of two issues not reflected in the rulings issued by either the hearing officer or EDR-the certification requirement mandated by the Code of VA and DHRM Policy 3.05, Compensation. Concerning the flexibility to "grandfather" the grievant to retain his position, VDOT has no such flexibility because the Code of Virginia at 10.1-561 mandates the certification requirement. While the hearing officer's reduction of the level of discipline administered by the agency is consistent with the authority granted to him under the provisions of the grievance procedure and Policy 1.60, VDOT cannot return the grievant to his former position since he does not meet the minimum requirements for the position.

Under DHRM's Policy 3.05, Compensation, agencies may either retain an employee in the same position and reduce responsibilities, or move an employee to a different position in the same or a lower pay band with a minimum of a 5% salary decrease for disciplinary, or performance related reasons. DHRM Policy 1.60, Standards of Conduct, gives agencies broad latitude to determine the appropriate level of discipline based on the employee's actions:

Accordingly, any offense that, in the judgment of agency heads, undermines the effectiveness of agencies' activities may be considered unacceptable and treated in a manner consistent with the provisions of this section (Section V.A).

In the instant case, to return the grievant to his former position undermines the effectiveness of agency activities because reinstating him to the Engineering Technician III position would be in violation of the Code of Virginia. In addition, in order to comply with Policy No. 1.60, that is, keeping in place the appropriate level of disciplinary necessary for the grievant to remain demoted, it would be necessary to reinstate the Group III Written Notice. Based on the foregoing factors, we are asking the hearing officer to revise his decision to comply with policy.

Ernest G. Spratley, Manager
Employment Equity Services



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8432-R2

Reconsideration Decision Issued: April 25, 2007

RECONSIDERATION DECISION

On April 23, 2007, the Department of Human Resource Management issued its ruling for this grievance. In accordance with the DHRM Ruling, the Agency's issuance to Grievant of a Group III Written Notice with demotion and pay reduction for failure to obtain an inspector's license needed for his position is **upheld**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.

Hearing Officer