

Issue: Group III Written Notice with termination (violation of a safety rule with a threat of physical harm); Hearing Date: 11/08/06; Decision Issued: 11/22/06; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8451; Outcome: Agency upheld in full. **Administrative Review: HO Reconsideration Request received 12/07/06; Reconsideration Decision 8451-R issued 12/21/06; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 12/07/06; EDR Ruling #2007-1524 issued 02/27/07; Outcome: Remanded to HO; Second Reconsideration Decision 8451-R2 issued 03/05/07 to permit additional evidence; Third Reconsideration Decision 8451-R3 issued 06/14/07; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 12/07/06; DHRM Ruling form letter issued 06/19/07 (no policy violation cited); Administrative Review: 2nd DHRM Ruling Request received 07/03/07; DHRM form letter issued 07/19/07; Outcome: No jurisdiction – referred to EDR to address; Administrative Review: EDR Ruling Request received from DHRM on 07/20/07; EDR Ruling # 2008-1746 issued; Outcome: Request Untimely – HO’s decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8451

Hearing Date: November 8, 2006
Decision Issued: November 22, 2006

PROCEDURAL HISTORY

On August 9, 2006, Grievant was issued a Group III Written Notice of disciplinary action with removal for violation of a safety rule with a threat of physical harm. On October 17, 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 she requested a hearing. On October 16, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On November 8, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
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?
5. Whether the Agency retaliated against Grievant?

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 until her removal effective August 9, 2006. The purpose of her position was:

General maintenance of tunnels, bridges, and roadway. Preventive maintenance on assigned equipment. Perform manual labor. Operate light duty and heavy equipment. Promote and practice safety work habits to keep traffic moving.¹

Grievant had prior existing active disciplinary action consisting of a Group I Written Notice issued on March 31, 2006.² Grievant earned an overall rating of Extraordinary Contributor on her 2005 performance evaluation.³

¹ Hearing Officer Exhibit 1.

² Agency Exhibit 6.

³ Grievant Exhibit 3.

The Agency employs a private contracting company to wash one of its tunnels. In order to wash the tunnel while permitting traffic to move through the tunnel, the Contractor must close one of the two lanes of traffic.⁴ A series of signs and temporary barriers is used to block off an additional portion of the lane until the entire lane is blocked. This is sometimes referred to as “taper”. Closing traffic to one lane requires a series of safety procedures to protect workers and motorists.

Attenuator trucks⁵ are trucks with “cushions” to the rear of the trucks that would serve to block or absorb the impact of a vehicle crashing into the rear of the truck. During a mobile operation, the attenuator trucks in the right lane often move slower than the approaching traffic thereby causing traffic to move to the left lane. Utility vehicles and workers in front of the attenuator trucks are protected by the attenuator trucks.

The Contractor entered into a contract with the Agency to provide services to the Agency including washing tunnel ceilings. As part of the agreement, the Contractor and Agency agreed:

Crash Cushions will be required for the installation and removal of advance warning signs per The Virginia Work Area Protection Manual.”⁶ In addition, the Contractor and the Agency agreed “Pages 6H-20 & 6H-21 of the Virginia Work Area Protection Manual shall serve as a general guideline for traffic control. However, after reviews conducted by the Facility Managers and Traffic Engineering, at the [tunnel], and [another tunnel], **three (3) Crash Cushions will be required** for the installation and removal of traffic control devices. No PCMS will be required. (Emphasis added).

Grievant’s supervisor gave Grievant a copy of the contract and its amendments. The supervisor reviewed each provision of the contract with Grievant including the requirement for three crash cushions for installation and removal of traffic control devices.

On July 20, 2006, the Contractor had his employees close the right lane of traffic passing through the tunnel. Using three attenuator trucks, arrow lights, barrels, and cones, the Contractor’s employees followed safety rules to set up a pattern of temporary barriers directing traffic in the right lane to move to the left lane as traffic approached the tunnel. Grievant observed all or a portion of the Contractor’s lane closure and set up for washing. The Contractor’s staff began cleaning.

⁴ The tunnel carries two lanes of traffic moving in the same direction.

⁵ Attenuator trucks are sometimes referred to as crash cushion trucks.

⁶ Agency Exhibit 8.

Grievant walked into the tunnel and advised the Contractor that he needed to move the arrow board⁷ and add several more barrels. The Contractor sent two of his employees out of the tunnel to accomplish the tasks as directed by Grievant. After 45 minutes passed, the Contractor called Grievant on the radio and Grievant said the employees were still working. The Contractor walked out of the tunnel and up the hill to find Grievant. He observed that Grievant had directed the employees to lengthen the start point of the taper by an additional 700 to 1000 feet.⁸ Grievant told the Contractor she had received a “new directive from Richmond.” The Contractor complained that Grievant watched his employees set up the taper without advising him of the new process. Grievant denied watching the Contractor’s employees set up the original taper. When Contractor asked Grievant to call the Supervisor to confirm Grievant’s comments, Grievant became agitated and said the Contractor would be in “big trouble and destroyed” and that it would be her word and others against his and that her word would prevail. Grievant added that the new taper position would continue in the future.

During the course of their discussions, the Contractor indicated he wished to use crash cushions when moving the arrow board. Grievant indicated he did not need to do so because the workers would be standing on the road shoulder and crash cushions were not necessary.

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).⁹ 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).

⁷ The arrow board is a series of lights on a rectangular sign. The lights can be activated to show a left pointing arrow or a right pointing arrow. The board can also be activated in a way so as to provide a lighted sign without showing a left or right arrow.

⁸ Grievant denies requiring the employees to extend the start point of the taper. There is no evidence to suggest that the two employees sent to address Grievant’s concerns came up with the idea of extending the start point. The Contractor did not wish to extend the starting point. Only Grievant would have the necessary influence to cause the starting point to be extended. The preponderance of evidence shows that Grievant decided to extend the starting point of the taper and instructed the two employees of the Contractor and the Contractor that the taper would be extended.

⁹ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

“Violating safety rules where there is a threat of physical harm” is a Group III offense.¹⁰ VDOT safety rules include, “Standards and guidelines of the current Virginia Work Area Protection Manual shall be used when setting, reviewing, and removing traffic controls.”¹¹ This Manual addressed when to use attenuator trucks. The safety rules applicable to the Contractor’s tunnel washing were clarified in his contract with the Agency. Grievant was provided a copy of the contract and expected to monitor its performance. She was aware of the safety rule requiring three attenuator trucks when installing or removing traffic control devices. The arrow board was a traffic control device essential to public safety. The type of changes to the taper that Grievant sought amounted to a new taper. Grievant should have started from the beginning the process of creating a taper. Instead, Grievant instructed the Contractor not to use attenuator trucks when moving the arrow board thereby causing the violation of a safety rule. Violation of this rule presented a threat of physical harm because of the realistic possibility that an inattentive driver on the interstate could have failed to recognize that the lane was being closed and crashed into workers or State property. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group III Written Notice for violating safety rules where there is a threat of physical harm. Removal is supported by DHRM Policy 1.60 upon the issuance of a Group III Written Notice.

The Agency contends Grievant also failed to follow a supervisor’s instruction on July 11, 2006. Approximately 30 or 40 minutes after her shift began, Grievant’s supervisor met with her to counsel her regarding another matter. He also informed her of an email and asked her to comply with the email. One of the provisions stated, “Person in charge reports to Control room identifies they are here and picks up radio for communication.” Since Grievant’s shift had already begun, she construed this requirement to apply to the beginning of her next shift. Grievant’s assumption was reasonable and, thus, Grievant did not fail to comply with a supervisor’s instruction by failing to immediately report to the control room.¹²

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....”¹³ 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

¹⁰ DHRM Policy 1.60(V)(B)(3)(f).

¹¹ Agency Exhibit 5.

¹² The Agency’s failure to establish that Grievant failed to comply with a supervisor’s instruction does not affect the outcome of this case.

¹³ *Va. Code § 2.2-3005.*

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.

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹⁴ (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence raises a sufficient question as to whether the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant contends the Agency retaliated against her. No credible evidence was presented showing the Agency retaliated against Grievant for engaging in a protected activity. The Agency took disciplinary action against Grievant because Agency managers believed she acted contrary to the Standards of Conduct.

DECISION

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

¹⁴ See Va. Code § 2.2-3004(A)(v). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

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.¹⁵

[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

¹⁵ 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: 8451-R

Reconsideration Decision Issued: December 21, 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.

Grievant seeks to reopen the hearing in order to present a video tape of the tunnel entrance to establish that the arrow board was not towed as alleged by the Agency. Since the tape existed at the time of the hearing, the tape is not new evidence.

Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, Grievant’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.

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8451-R2

Reconsideration Decision Issued: March 5, 2007

SECOND RECONSIDERATION DECISION

On February 27, 2007 the EDR Director issued Ruling 2007-1524 outlining a new definition of what constitutes newly discovered evidence. Upon consideration of the standard set forth in that decision, the Hearing Officer will reopen the hearing to permit Grievant to present a copy of the video tape she believes exists. The Agency is **ordered** to grant Grievant reasonable access to view and obtain a copy of the appropriate video tape. Grievant is **ordered** submit a copy of the video tape with a written explanation of its relevant portions. Grievant should provide the Agency's Representative with a copy of any evidence or argument submitted to the Hearing Officer. The Agency should timely respond to Grievant's submission.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8451-R3

Reconsideration Decision Issued: June 14, 2007

THIRD RECONSIDERATION DECISION

The Hearing Officer reviewed the two video tapes relating to this grievance. The videos do not change the outcome of this grievance.

The West Bound tape shows vehicles entering the tunnel. It shows a small portion of the area inside the tunnel. The video consists of a series of still images taken approximately 7 seconds apart. In addition, the East Bound tape shows the fronts ends of vehicles. It shows a small portion of the tunnel. The video images on the East Bound tape are approximately 8 seconds apart.

Because of the separation between images, it is likely that vehicles passed through the tunnel area without being captured on the videos. Vehicle drivers and vehicle license plates cannot be determined from the pictures.

The East Bound tape shows vehicles in the left and right lane moving in the same direction prior to the time 21:40. At 21:40, traffic in the right lane stops. At 21:59, a pickup truck and several other larger trucks pass through in the right lane. At 22:23, a pickup truck stops in front with a larger truck behind it. At 23:35 another pickup truck parks in front of the first pickup truck. At 23:51, that pickup drives off, out of the camera's view.

The cameras are stationary and reveal little about the path the Contractor followed. The Contractor's credibility is not adversely affected by the videotapes. There is no basis to change the original hearing decision.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

June 19, 2007

RE: **Grievance of Grievant v. Department of Transportation**
Case No. 8451

Dear :

The Agency head, Ms. Sara R. Wilson, has asked that I respond to request for an administrative review of the hearing officer's decision in the above referenced case because the grievant felt that punishment with a Group III Written Notice is excessive in light of her having received only one Group I written Notice in her eleven years of employment with the Department of Transportation (VDOT). Please note that, as advised on pages 6 and 7 of the original hearing decision and as outlined in the Grievance Procedure Manual, either party to the grievance may file for an administrative review 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 (DHRM) to review the decision. You must refer to the specific policy and explain why you believe the decision is inconsistent with that policy.

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of the Department of Employment Dispute Resolution (EDR) to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

This Agency carefully reviewed the hearing officer's original decision, the three reconsideration decisions, and the ruling from the Department of Employment Dispute Resolution. However, we failed to find any policy misapplication or policy violation by the hearing officer. Neither you nor your representative identified any DHRM or VDOT human resource policy with which the hearing officer's decision is inconsistent or violates. Rather, it appears that the issues you raised are related to how the hearing officer assessed the evidence and how much weight he placed on that evidence. The authority of DHRM is restricted to reviewing issues related to the application and interpretation of policy. Because there is no identified specific misapplication or violation of either DHRM or VDOT human resource policy by the hearing officer

in making his decision, this Agency has no basis to interfere with the application of this decision.

If you have any questions regarding this correspondence, please contact me at (804) 225-2136 or 1 (800) 533-1414.

Sincerely,

Ernest G. Spratley, Manager
Employment Equity Services