

Issue: Group II Written Notice (failure to follow instructions); Hearing Date: 07/20/07; Decision Issued: 07/30/07; Agency: VDOT; AHO: Thomas P. Walk, Esq.; Case No. 8629; Outcome: No Relief – Agency Upheld in Full; **Administrative Review:** **HO Reconsideration Request received 08/13/07; Reconsideration Decision issued 08/17/07; Outcome: Original decision affirmed; Administrative Review:** **EDR Ruling Request received 08/13/07; Outcome pending; Administrative Review:** **DHRM Ruling Request received 08/13/07; Outcome pending.**

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO.: 8629 (DEPARTMENT OF TRANSPORTATION)

HEARING DATE: JULY 20, 2007

DECISION ISSUED: JULY 30, 2007

DECISION OF HEARING OFFICER

PROCEDURAL MATTERS

The agency gave the grievant a Group II Written Notice on February 9, 2007. He filed this grievance on February 16. I was appointed as hearing officer on June 18 and received notice of the appointment on June 21. A pre-hearing telephone conference call was held on July 6, 2007. The hearing was held on July 20 at the district office of the agency.

APPEARANCES

Grievant

Agency Representative

Four witnesses for the agency.

One additional witness for the grievant.

ISSUES

1. Whether the grievant committed the misconduct for which the Written Notice was issued?
2. Whether the misconduct justified the issuance of the Written Notice?
3. Whether the issuance of the Written Notice was consistent with law and policy?
4. Whether the evidence revealed any mitigating facts or circumstances which would justify a reduction in the level of punishment?

FINDINGS OF FACT

At all relevant times the grievant served as the bridge crew supervisor at a residency of the agency.

On June 26, 2006 a pipe arch underneath a State secondary road was washed away by a storm. The pipe had been replaced by August 18, 2006, leaving as further repair work the construction of an end wall. On November 7 the Environmental Clearance Package (ECP) required by the agency was submitted to the residency at which the grievant worked for implementation in the construction of the end wall. The grievant and his crew began construction on the end wall on January 18, 2007.

The grievant and his crew were required to implement measures to minimize the sedimentation or siltation of the waterway as required by Virginia Erosion and Sedimentation Regulations. When the project was inspected by the Environmental Specialist on January 24 he found that the required erosion and sedimentation measures had not been implemented. He issued a report that the project was non-compliant. The grievant and his crew undertook the required measures later that same day. On the following day the Environmental Specialist found the project to be compliant.

DISCUSSION AND OPINION

The Virginia Personnel Act, Virginia Code §2.1-110, et seq., provides a mechanism for employees of an agency of the Commonwealth to challenge certain actions by the agency. One of those actions is the issuance of a disciplinary written notice. This grievance is regarding the

issuance of a Group II Written Notice pursuant to Policy No. 1.60 of the Department of Human Resource Management Policies and Procedures Manual (Standards of Conduct). Under that policy Group II offenses “include acts and behavior that are more severe in nature and are such that an accumulation of two (2) offenses should warrant removal.” One of the specific acts listed in that section of offenses is the “failure to follow a supervisors instructions, perform assigned work, or otherwise comply with established written policy.”

The grievant concedes that he failed to follow the requirements of the Environmental Clearance Package in the initial work on the end wall. His failure to meet those requirements clearly supports the issuance of the subject disciplinary action. This is not a case in which the instructions were unknown or ambiguous. The grievant gave no reasonable explanation for his failure to follow these requirements.

The grievant does not argue, and I do not find, that the application of these standards of conduct to him for this offense was a misapplication of policy. His argument is that other similar violations occurred on this project and that the individuals responsible for those violations were not similarly punished. In short, he believes that he has been singled out unfairly for punishment, possibly in retaliation for his being involved in a complaint against another employee. I do not find that the evidence presented on those arguments is sufficient to support a finding by me that the agency has unfairly applied its policies to the grievant. The evidence as to the other alleged violations did not establish to my satisfaction that the acts or omissions of others would have been sufficient, under any circumstances, to justify the issuance of a Notice. Those circumstances may have existed, but the evidence was lacking to those circumstances.

The grievant also argues that he cannot be held to answer for the acts and omissions as he was not the “permit holder under the ECP.” I do not accept this argument. It is an attempt by

the grievant to shift the blame from himself to someone who could, at best, be vicariously responsible.

When the agency issued the Notice to the grievant it did not impose any additional sanctions. Under Policy 1.60 the agency could have suspended the grievant for up to ten (10) work days without pay. Instead, it only issued the Written Notice. The residency administrator testified that this was done in light of the mitigating factor of the good work history of the grievant over a number of years. I do not find the existence of any additional mitigating factors. As an administrative hearing officer my job is not to be a “super personnel-manager.” I am required to give an appropriate amount of deference to the decisions of the agency in its determination of the appropriate level of discipline to impose. *Department of Corrections v. Compton*, 47 Va. App. 202, 623 S.E. 2d 397 (2005).

In this case I find that the agency has acted within the bounds of reason and his actions should be given due deference.

DECISION

For the reason stated above, I hereby uphold the issuance of the Group II Written Notice to the grievant.

APPEAL RIGHTS

As Sections 7.2 and 7.3 of the Grievant Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director's authority is limited to ordering the hearing officer to review the decision to conform it to written policy.

3. **A challenge that the hearing decision does not comply with grievance procedure** to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date of the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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.

Decided this July 30, 2007.

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer

COMMONWEALTH OF VIRGINIA,

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO.: 8629 (DEPARTMENT OF TRANSPORTATION)

HEARING DATE: JULY 20, 2007

DECISION UPON RECONSIDERATION ISSUED: AUGUST 17, 2007

DECISION UPON REQUEST FOR RECONSIDERATION

On August 13, 2007 the grievant submitted to me, by email, a request for reconsideration of my decision in this matter. I have reconsidered that decision but choose not to modify it.

The grievant argues that the evidence establishes that other individuals also failed to follow established environmental safeguards and were not punished for doing so. In my process of drafting my decision I considered the evidence as a whole, including those portions of the testimony cited by the grievant. Although the grievant may be correct and that other individuals should have been given disciplinary action, the evidence does not rise to the level of being sufficient to establish that fact, or the fact that he has been unfairly singled out for discipline with regard to this project. To the extent that the evidence was presented, it was ambiguous and incomplete. Therefore, I cannot find that the agency abused its discretion or unfairly applied its policies to the grievant.

Decided this August 17, 2007

Thomas P. Walk, Hearing Officer