

Issues: Group II Written Notice with termination (due to accumulation) (Failure to Follow Policy); Hearing Date: 10/15/07; Decision Issued: 10/16/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8706; Outcome: No Relief, Agency Upheld In Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8706

Hearing Date: October 15, 2007
Decision Issued: October 16, 2007

PROCEDURAL HISTORY

On June 20, 2007, Grievant was issued a Group II Written Notice of disciplinary action with removal based on the accumulation of disciplinary action for failure to follow policy. On June 27, 2007, 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 10, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 15, 2007, 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 a Transportation Operator II at one of its Facilities. He had been employed by the Agency for over two years. One of his duties included driving motor vehicles. He holds a commercial driver's license issued through the Virginia Department of Motor Vehicles.

Grievant has prior active disciplinary action. On April 24, 2006, Grievant received a Group II Written Notice for failure to follow both Virginia DMV Commercial Driver License and Federal Motor Carrier Safety Requirements to perform a complete pre-operative inspection of a commercial vehicle.¹

On June 20, 2007, Grievant was assigned responsibility to drive a dump truck from his Facility to the Agency's Shop. The distance between these two locations is approximately 12 miles and would require travel over public highways. Grievant knew that prior to driving a dump truck on the highway, he was obligated to perform a pre-trip inspection to determine whether the vehicle could be operated safely and then make an entry in the vehicle's log book to signify he completed the inspection. A pre-trip inspection requires approximately 15 to 30 minutes to complete.

¹ Agency Exhibit 5.

A co-worker wanted to remove some personal items from the dump truck and he asked Grievant for the keys. Grievant asked the co-worker if he would bring the truck to the front of the Facility since the co-worker was going to unlock the truck anyway. The co-worker agreed. A few minutes later, the co-worker entered the truck and drove it from the back to the front of the Facility. The co-worker did not perform a pre-trip inspection because he did not intend to drive the vehicle on the highway. Grievant entered the vehicle without performing a pre-trip inspection or making an entry in the vehicle log book.

Once Grievant drove the truck to the Shop, the Mechanic inspected it. The Mechanic noticed that the log book had not been signed. Grievant admitted to the Mechanic that he had not performed a pre-trip inspection. The Mechanic found several problems with the dump truck that a pre-trip inspection would have revealed. These included: (1) free play in the clutch pedal that was not within the allowable range, (2) the driver's side door window crank was broken and non-functional, and (3) the front shaft was without grease, causing a vibration in the engine.

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).² 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 ... comply with established written policy" is a Group II offense.³ 49 CFR § 392.7 provides, "[n]o commercial motor vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed:

- Service breaks, including trailer brake connections.
- Parking (hand) break.
- Steering mechanism.
- Lighting devices and reflectors.
- Tires.
- Horn.
- Windshield wiper or wipers.

² The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

³ DHRM § 1.60(V)(B)(2)(a).

Rear-vision mirror or mirrors.
Coupling devices.

The Agency requires drivers of commercial vehicles to comply with the Virginia Commercial Driver's Manual issued by the Virginia Department of Motor Vehicles. Section 1 provides, "Federal and state laws require drivers to inspect their vehicles before every trip."⁴ The Agency has adopted 49 CFR § 392.7 and the Virginia Commercial Driver's Manual and its policies governing operation of VDOT motor vehicles and communicated those policies to its employees including Grievant. Grievant failed to perform the pre-trip inspection of the dump truck before driving it on Virginia highways. Grievant acted contrary to established written policy thereby justifying the issuance of a Group II Written Notice.

Accumulation of a second active Group II Written Notice "normally should result in discharge."⁵ Grievant received a Group II Written Notice on April 24, 2006. With the Written Notice giving rise to this appeal, Grievant has received two Group II Written Notices thereby justifying removal. The Agency's decision to remove Grievant must be upheld.

Grievant argued that he observed the co-worker walk around the dump truck and thus, he assumed the co-worker had conducted the inspection for Grievant. This argument fails. A pre-trip inspection requires a minimum of 15 minutes. Only a few minutes passed from the time Grievant gave the co-worker the keys to the vehicle and the time he brought the vehicle to Grievant. Grievant knew or should have known that the co-worker would not have had sufficient time to complete a pre-trip inspection.

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..."⁶ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes 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 among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

⁴ Agency Exhibit 3.

⁵ DHRM § 1.60(VII)(D)(2)(b).

⁶ *Va. Code § 2.2-3005.*

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:

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].

S/Carl Wilson Schmidt

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.