

Issue: Group I Written Notice (failure to follow safety procedures); Hearing Date: 12/20/07; Decision Issued: 12/21/07; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8757; 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: 8757**

Hearing Date: December 20, 2007  
Decision Issued: December 21, 2007

**PROCEDURAL HISTORY**

On July 25, 2007, Grievant was issued a Group I Written Notice of disciplinary action for failure to use proper safety procedures while operating State equipment. On August 20, 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 December 5, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 20, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Representative  
Witnesses

**ISSUES**

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 Crew Member at one of its Facilities. He was responsible for driving State vehicles and operating those vehicles properly. No evidence of prior active disciplinary action<sup>1</sup> against Grievant was introduced during the hearing.

On January 19, 2007, Grievant was driving a pickup truck with a trailer attached to the truck. Two other employees were in the truck with Grievant. They were in the process of picking up several temporary road signs previously placed along a road to notify travelers that VDOT employees would be working on the road. The speed limit on the road was 45 mph. The road was the second most traveled road by motorist in the locality. Grievant parked his truck on the right side of the road. The right wheels of his vehicle were on the shoulder of the road. The left wheels of his vehicle were on the road pavement. Another pickup truck driven by Ms. H began passing Grievant's vehicle on Grievant's left-hand side. Grievant opened the driver's side door to exit the truck. As he opened the door, the side edge of the door blocked the path of the right side mirror on Ms. H's truck. The mirror collided with the door of Grievant's vehicle and the mirror broke off and dangled from the side of Ms. H's truck. Later inspection revealed that there was no damage to Grievant's State vehicle.

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<sup>1</sup> Counseling letters are corrective action but not disciplinary action under DHRM Policy 1.60, Standards of Conduct.

A State Trooper arrived at the scene of the accident and obtained statements from Grievant and Ms. H. Grievant told the Trooper:

We were sitting off the road as far as I could get off. We were picking up signs. We were getting out of the truck and I heard a crack as the truck was passing. I had my door cracked but she didn't hit that I think. I don't know where she hit.

Ms. H told the Trooper:

I was heading toward [Route] and this VDOT truck was pulled over toward the side of the road. All the traffic in front of me was passing the VDOT truck. As I was passing the VDOT truck, the driver opened his door. I hit his door with my mirror as I passed.

The Trooper concluded:

My opinion is that both drivers were partially negligent. [Ms. H] needed to provide more room between her vehicle and the stopped VDOT truck when passing. Likewise [Grievant] needed to be more aware of traffic proceeding through his work site before opening his door.<sup>2</sup>

### **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.”<sup>3</sup> 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.” Group III offenses “include acts and behavior of such a serious nature that a first occurrence should normally warrant removal.”

“Inadequate or unsatisfactory work performance” is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant's operation of the State vehicle on January 19, 2007 was inadequate or unsatisfactory job performance. He was entrusted with the safe and proper operation of the vehicle. He could have avoided the accident in several ways. First, Grievant should

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<sup>2</sup> Agency Exhibit 5.

<sup>3</sup> The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

have looked more closely at his mirrors before opening the driver side door. Grievant's left side mirror consisted of two mirrors. The top larger part of the mirror was designed to enable the driver to see traffic behind the State vehicle. Immediately below that larger mirror was a smaller convex mirror designed to show objects close to the vehicle but at a wider distance away from the vehicle. If Grievant had looked at the convex mirror he should have been able to observe Ms. H's truck approaching. Second, Grievant could have parked the truck on a road perpendicular to the road on which he chose to park the State vehicle. Fewer cars traveled on this other road that ended in a cul-de-sac. His vehicle would not have been in the way of other vehicles.

Grievant argues that the Agency cannot discipline him because it failed to provide him with a copy of the policy entitled "Licensed Motor Vehicles/Unlicensed Self-Propelled Equipment". This policy provides that an employee may appeal the decision of the Central Review Committee<sup>4</sup> relating to the Committee's conclusion that the employee caused a preventable accident. Grievant's argument fails. Nothing in the policy requires the Agency to provide a copy of the policy to Grievant to enable him to appeal the decision of the Central Review Committee that the accident was preventable. In addition, the decision of the Central Review Committee is not binding on the Hearing Officer. To the extent Grievant could have presented defenses to the Central Review Committee, he had the opportunity to present those defenses to the Hearing Officer.

Grievant argues that the three prior written counseling letters that he received had expired and that he should have received another letter of counseling rather than a Written Notice. It is not necessary for the Agency to issue an employee a letter of counseling prior to issuing a Written Notice. A letter of counseling serves to provide an employee with notice that an Agency finds certain behavior of concern. A counseling letter is not a condition precedent to the issuance of a Written Notice. Accordingly, the validity or expiration of the three prior letters of counseling given to Grievant has no bearing on the outcome of this grievance.

Grievant argues that Ms. H was driving her truck too close to Grievant's vehicle. If she had left more room between the two vehicles as she passed, the accident would not have occurred. Although this factual assertion is consistent with the opinion of the State Trooper, it does not excuse Grievant's action. If Grievant had looked through his mirrors he would have observed that Ms. H was passing him too closely. Thus, Grievant remained in a position to counter the error of Ms. H. His failure to do so was unsatisfactory work performance.

*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...."<sup>5</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing

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<sup>4</sup> VDOT's Central Review Committee concluded that the accident was preventable.

<sup>5</sup> *Va. Code § 2.2-3005.*

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.

Grievant contends the Agency should have more timely issued the Written Notice. The incident occurred on January 19, 2007 yet the Agency waited until July 25, 2007 to issue the Written Notice.<sup>6</sup> Although the Agency should have issued the Written Notice on a timelier basis, a six-month delay under the facts of this case is not sufficient to mitigate the disciplinary action. There is no reason to believe that Grievant or the presentation of his case at hearing has been adversely affected by the delay. In light of the standard set forth in the *Rules*, 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 I Written Notice 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

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<sup>6</sup> Part of the delay resulted from the Agency's internal review procedure to determine whether the accident was preventable. This review ended in May 2007.

101 North 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>7</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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