

Issue: Removal from Employment – Unable to Meet Work Conditions; Hearing Date: 05/05/08; Decision Issued: 05/06/08; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8829; 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: 8829

Hearing Date: May 5, 2008
Decision Issued: May 6, 2008

PROCEDURAL HISTORY

On February 1, 2008, the Virginia Department of Transportation sent Grievant a letter notifying him that he would be removed from employment effective February 4, 2008 because he no longer held a Commercial Driver's License.

On February 19, 2008, 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 April 3, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 5, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency removed Grievant from employment in accordance with State and Agency policy?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that Grievant's 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 until his removal effective February 4, 2008. The purpose of his position was to, "operate highway maintenance equipment and perform physically demanding work to preserve and maintain roadway assets."¹

On September 21, 2005, the Agency sent Grievant a letter offering him employment with the Agency effective October 10, 2005. The letter advised Grievant:

An essential requirement for this position is that you acquire a CDL (Commercial Driver's License). You will have 90 days from your employment date to obtain this license. DMV has a set timeframe to obtain this license. This is a two-part license, written and actual hand-all in testing with the state vehicle. We urge you to make this a priority because without it you will lose the position.²

On October 6, 2005, Grievant signed a document entitled "Summary of VDOT's Policy on the Loss of Commercial Driver's License". This document stated:

VDOT's Policy on the Loss of Commercial Driver's License, HP 100, states that if an employee who is hired/assigned to a position which requires a CDL and has his/her CDL disqualified, the agency will respond as follows [In each case, management's decision on which alternative is to be made will be based on the availability of work as well as the skills and qualifications of the employee, not on the performance level of the employee.]:

¹ Agency Exhibit 3.

² Agency Exhibit 2.

1. Disqualification for 90 days or less will result in either assignment to tasks which do not involve operation of any type of licensed commercial motor vehicles; or placement on Conditional Leave Without Pay.
2. Disqualification for over 90 days to 12 months will result in either demotion or transfer to an available position the employee is minimally qualified to fill and which does not require a CDL; or placement on Conditional Leave Without Pay; or termination.
3. Disqualification for 12 months or longer will result in termination.
4. Employees in their probationary period or wage employees will be terminated immediately upon any disqualification.
5. If an employee fails to notify management of loss of CDL within five calendar days, the employee is subject to the full range of disciplinary action under the Standards of Conduct, including termination.

A copy of the entire Virginia Department of Transportation's Policy on the Loss of Commercial Driver's License may be obtained from your human resources office.³

Grievant obtained his CDL in accordance with the Agency's expectations. On October 6, 2007, Grievant was arrested for driving a motor vehicle under the influence. He was found guilty of the charge on January 31, 2008. His driver's license was suspended for a period of 12 months effective January 31, 2008. Grievant's CDL was suspended for a period of 12 months.

Grievant's Supervisor, the Transportation Operations Manager III, and the Residency Administrator met to discuss Grievant's loss of his CDL. They concluded they could not move Grievant to a Transportation Operator I position⁴ because the business needs of the Residency required all of its transportation operators to hold a commercial driver license enabling them to operate large equipment such as dump trucks in the event Agency employees needed to respond to roadway accidents or remove snow during inclement weather. Accordingly, they decided to remove Grievant from employment because he no longer held a CDL.

³ Agency Exhibit 5.

⁴ The Transportation Operator I position did not require a CDL.

CONCLUSIONS OF POLICY

Department of Human Resource Management Policy 1.60 Standards of Conduct, provides:

An employee unable to meet the working condition of his or her employment due to circumstances such as those listed below may be removed under this section. Reasons included: 1. loss of a driver's license that is required for performance of the job.

Grievant was required to maintain a CDL as part of his job as a Transportation Operator II. When Grievant lost his CDL, he was unable to meet the working condition of his employment and, thus, the Agency was authorized to issue Grievant a letter removing him from employment.

Agency Policy HR 100, Commercial Driver's License, provides:

Each CDL loss will be reviewed on a case-by-case basis and the following procedure will be followed by the Agency. (Management's decisions regarding the assignment of an individual to other tasks and/or decisions to demote or transfer employees shall be based on the availability of work as well as the skills and qualifications of the employee, not the performance level of the employee.) ***

3. A first loss or disqualification of CDL and subsequent license suspension for twelve (12) months or longer shall result in termination.

Grievant lost his CDL for 12 months and, thus, the Agency was authorized to remove Grievant under HR 100 (V)(A)(3).

Instead of removing Grievant pursuant to HR 100 (V)(A)(3), the Agency applied HR 100 (V)(A)(2) which provides:

A first loss or disqualification of CDL for over 90 days twelve (12) months will result in one of the following actions:

- a. Demotion or transfer to an available position the employee is minimally qualified to fill and which does not require a CDL in order to perform the essential functions of the position ***
- b. Placement on Conditional Leave Without Pay *** or
- c. Termination.

HR 100 authorizes the Agency managers to select one of three options including removal. The Agency managers evaluated whether it was a business need to have Grievant work as a Transportation Operator I and they concluded no such need existed. Agency managers concluded that removal was the appropriate course of action to take with respect to Grievant's employment. That decision is supported by Agency policy and by DHRM policy and must be upheld.

Grievant argues that the agency could have created a Transportation Operator I position for him which would have enabled him to remain an employee. Grievant argued that the Agency had done so for other employees in the past. Neither DHRM nor Agency policy requires the Agency to search for an available position for Grievant and place them in that position. HR 100 provides Agency managers with three options to exercise within its sole discretion. There is no reason to believe that the Agency singled out Grievant for unique treatment based on an improper motive or reason. The Agency made its decision based upon its legitimate business needs.

Grievant argued that the Agency could have placed Grievant in a vacant hourly Transportation Operator I position. The evidence showed that the Agency's practice was never to demote an employee from a classified position to an hourly position. In addition, the Agency intended to abolish the hourly position by July 1, 2008 and contract out the services.

Grievant argued that he had a learning disability and that the Agency failed to advise him of the availability for alcohol treatment. If the Hearing Officer assumes for the sake of argument that both of these assertions are true, neither affects the outcome of this case. Any disability claimed by Grievant would not affect a Court's removal of his CDL. There is no accommodation that would have the effect of reversing a Court's finding of guilty and Grievant's removal of his CDL. Grievant's CDL is an essential function of his position as a Transportation Operator II.⁵ The Agency has no obligation to offer Grievant alcohol treatment.

Grievant argued that the action against him should be mitigated. Mitigation, as described by the Rules for Conducting Grievance Hearings, applies only to cases of disciplinary action. In this case, Grievant was not disciplined and did not receive a Written Notice. Accordingly, mitigation is not applicable. The only issue is whether the Agency complied with State and Agency policy and it has presented sufficient evidence to show that it did so.

Grievant argued that the Agency failed to permit him to have a representative, Mr. S, at his pre-termination fact finding meeting. This argument is moot. Mr. S represented Grievant during the second step meeting and could have assisted Grievant with the presentation of any necessary information to the Agency at that time. In addition, any information that Grievant failed to present to the Agency because he

⁵ Fifty percent of Grievant's duties under his Employee Work Profile required him to operate equipment including commercial motor vehicles.

lacked a representative, Grievant could have presented to the Hearing Officer during the hearing.

DECISION

For the reasons stated herein, the Agency's removal of Grievant from employment must be **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.⁶

[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

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.