

Issue: Group I Written (unsatisfactory job performance); Hearing Date: 08/19/08;
Decision Issued: 09/12/08; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.;
Case No. 8900; 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: 8900

Hearing Date: August 19, 2008
Decision Issued: September 12, 2008

PROCEDURAL HISTORY

On March 31, 2008, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance.

On April 9, 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 July 14, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 19, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
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 Transportation Construction Inspector at one of its Facilities. He has been employed by the Agency for over 20 years. The purpose of this position is, "[i]nspection of assigned maintenance contracts and to monitor contractor's work to ensure compliance with plans, specifications and provisions of the contracts, MUTCD, Erosion and Sediment controls." No evidence of prior active disciplinary action against Grievant was introduced during the hearing.

Under the Agency's safety rules applicable to contractors working on Virginia highways, "[s]afety vests shall be worn by all employees exposed to vehicular traffic and construction equipment." Grievant was aware of this requirement.

On March 3, 2008, several employees of a private contractor were working on a highway guardrail. At least three employees were not wearing safety vests. The highway consisted of four lanes. Two lanes headed south and two lanes headed north. The north and south lanes were separated by a grass strip. The guardrail was located on the left-hand side of the northbound lanes. The contractor's employees parked their work truck in the left lane of the two northbound lanes. The truck was parked within a few inches of the centerline between the two northbound lanes. The truck had storage bins on each side. The truck should have been parked closer to the left shoulder and guardrail so as to provide more room for vehicles traveling northbound driving in the right side lane. To gain access to the storage bins, an employee would have to stand in or very close to the right-hand passing lane.

Grievant drove his vehicle south on the highway until he came to an intersection. He made a U-turn to his left and drove north on the highway. He passed the contractor's truck on his left and parked his vehicle on the right shoulder approximately 20 feet past the contractor's truck.

The Resident Administrator and the Assistant Resident Administrator rode in their vehicle south on the highway. They looked to the left and could observe the contractor's truck and Grievant's parked vehicle. They continued traveling south on the highway down to the stop light. Their vehicle made a left U-turn and began traveling north on the highway. By the time they reached the contractor's truck, they observed that the truck was parked too close to the centerline of the lane and at least three of the contractor's employees were not wearing safety vests.¹ The Resident Administrator observed one of the contractor's employees open the passenger side of the truck and get into the vehicle leaving the door open. The door opened into the passing lane.

The Resident Administrator instructed the contractor's employees to move the truck closer to the guardrail. The truck was then moved approximately two feet closer to the guardrail.

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."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." 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 was responsible for monitoring contractor safety. As Grievant drove past the contractor's truck, he failed to observe that the truck was parked too far to the center of the lane. He also failed to observe at least three employees not wearing safety vests. Grievant had receive sufficient training from the Agency to enable him to know that the contractor's truck was parked too close to the centerline of the northbound highway and to know that the contractor's employees should have been wearing safety vests. Grievant's failure to observe the truck inappropriately parked and the employees

¹ Approximately 4 or five minutes pass from the time the Resident Administrator and Assistant Resident Administrator first observed Grievant's vehicle to the time they reach the contractor's vehicle.

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

without safety vests constitutes inadequate or unsatisfactory work performance to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant contends that the three employees who were not wearing safety vests may have been inside of the truck when he passed the truck. This scenario is just as likely as the scenario that the three employees were outside of the truck when Grievant passed the truck and Grievant simply failed to observe the three employees. Even if the Hearing Officer disregards the three employees not wearing vests, there remains a sufficient basis to issue disciplinary action. When Grievant drove his vehicle past the contractor's truck, it should have been clear to Grievant that the truck was parked too close to the center line thereby creating a safety hazard for cars passing in the right lane or employees attempting to enter the truck on its right side.³

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...."⁴ 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.

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:

³ Grievant argued that he was delayed in correcting the problem with the contractor because he was making a business-related cell phone call. The Agency has a zero tolerance for safety violations. The Agency's witnesses testified convincingly that Grievant should have ended his cell phone call and immediately corrected the safety problem.

⁴ *Va. Code § 2.2-3005.*

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.⁵

[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

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.