

Issue: Group II Written Notice (failure to follow policy and instructions); Hearing Date: 11/20/08; Decision Issued: 12/03/08; Agency: VDOT; AHO: Lorin A. Costanzo, Esq.; Case No. 8976; Outcome: No Relief – Agency Upheld in Full.

Commonwealth of Virginia
DEPARTMENT OF TRANSPORTATION

DECISION OF HEARING OFFICER

In the matter of: Case No: 8976

Hearing Date: November 20, 2008

Decision Issued: December 3, 2008

PROCEDURAL HISTORY

Grievant was issued a Group II Written Notice on July 10, 2008 for not following Written Policy (Asset Management Policy and Procedure 5.00) and Failure to Follow Supervisors orders.

The Written Notice indicated under *Nature of Offense and Evidence*:

"On 6/23/08 you operated R03750 which is a single axle dump truck. On 6-25-08 a District Quality Assurance Checklist was performed on this piece of equipment. Upon further review the log book was not signed on the day you operated this truck. You have been instructed multiple times in our morning safety meetings to do your pre-trip and sign the log book. In addition to the log book not being signed there were multiple deficiencies found that should have been spotted during the visual walk around."

On July 27, 2008 Grievant grieved the Group II Written Notice issued on July 10, 2008. The matter preceded through the resolution steps and when matters were not resolved to the satisfaction of Grievant he requested, on September 17, 2008, that the matter be qualified for hearing. Agency Head qualified the matter for hearing on September 23, 2008.

On August, 26, 2008 Residency Administrator requested, in writing, a time extension until September 8, 2008 to review and investigate items before making a final determination as to the Second Resolution Step. Grievant signed on August 26, 2008 agreeing to the time extension.¹

On November 3, 2008, the Department of Employment Dispute Resolution assigned this matter to the Hearing Officer. A pre-hearing telephone conference was held on November 10, 2008 and Hearing was held on November 20, 2008.

On November 20, 2008, prior to opening arguments, Grievant requested to introduce documents which were not previously exchanged. The exchange due date was set at the pre-hearing conference, at the request of Grievant and with the consent of Agency Advocate, as

¹ Agency Exhibit Tab 2, pg 4.

November 17, 2008. On November 20, 2008, Grievant presented the documents he desired to admit to Agency Advocate and the parties discussed the documents outside the presence of the hearing officer. The Agency objected to the admission of the documents. After consideration of the request and the objections it was the determination of the hearing officer that the documents be admitted subject to Agency being allowed a continuance to a date and time of their choosing. The continuance was offered Agency to allow Agency opportunity to receive the documents at least five business days prior to a continued hearing.

A continuance was not desired by Agency who expressed concerns over expense and scheduling issues. Agency requested to proceed forward with their Objection being noted. Grievant then moved for a continuance of the hearing. The hearing officer denied Grievant's request for a continuance noting that Grievant was the party initiating the grievance and matters were set on a timeline based upon the filing of the grievance and other equitable factors.

APPEARANCES

Grievant
Agency Advocate/Presenter
Agency Party Representative -Transportation Manager III (who was also a witness)
Witnesses: Transportation Operations Manager I
 Transportation Operations Manager II
 Assistant Residency Administrator
 Residency Administrator

ISSUES

Were the Grievant's actions such as to warrant disciplinary actions under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

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. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.²

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witness, the Hearing Officer makes the following findings of fact:

² Department of Employment Dispute Resolution, Grievance Procedure Manual, ("GPM") Section 5.8 and 9.

Grievant filed a timely appeal from a Group II Written Notice issued on 7/10/08 for not following Written Policy (Asset Management Policy and Procedure 5.00) and Failure to Follow Supervisors orders. Following the failure to resolve the matter at the third resolution step, this grievance was qualified for a hearing on September 23, 2008.³

An Agency dump truck was assigned identification number R03750 which identification number was painted on the vehicle. On June 23, 2008 Grievant's immediate supervisor assigned him duties involving operation of R03750.⁴ Agency was cleaning up storm debris from the previous weekend and the district residency area headquarters was not under any type of emergency operation status on June 23, 2008.

At all times relevant to matters Grievant was employed by Agency as an equipment operator and crew member and Grievant had a Class "A" Commercial Drivers License (C.D.L.).

A C.D.L. is required to operate R03750 and the operator is required to sign the log book and conduct a pre-trip/pre-operation inspection utilizing the printed "pre-operational check list" contained in its log book. R03750's log book includes, but is not limited to, pages/forms entitled, "Pre-Operational Checklist", "Pre-Operational Vehicle Inspection Form", and "Vehicle Inspection Procedure".

- a. The "Pre-Operational Checklist" indicates 21 numbered items to be checked or accomplished prior to operating the vehicle. The checklist provides, "DEFICIENCIES SHOULD BE CORRECTED IMMEDIATELY OR ARRANGEMENTS MADE FOR REPAIRS. UNSAFE UNITS SHOULD BE REMOVED FROM SERVICE UNTIL REPAIRS ARE MADE."
- b. The "Pre-Operational Vehicle Inspection Form" is required to be signed by the operator indicating performance of the pre-operational vehicle inspection with the date of the inspection and whether deficiencies were found or not. Additional actions are required if deficiencies are found.
- c. The "Vehicle Inspection Procedure" form provides a walk around procedure for conducting the inspection.⁵

As a part of his duties on 6/23/08, Grievant was assigned to and operated the Agency dump truck identified as "R03750". He was required to conduct a pre-trip/pre-operation inspection of R03750 and to sign the log book's "Pre-Operational Vehicle Inspection Form". However, he did not do so. The "Pre-Operational Vehicle Inspection Form" for R03750 was not filled out or signed by Grievant on 6/23/08.⁶

Grievant has received training on requirements as to maintaining log books and pre-trip

³ Agency Exhibit Tab 2, pg. 2.

⁴ Agency Exhibit Tab 2, pg. 10.; Agency Exhibit Tab 3, pg.1

⁵ Agency Exhibit Tab 5.

⁶ Agency Exhibits, Tab 5.

inspections. He attended C.D.L. Equipment Log Book Training on November 19, 2003.⁷ He attended morning safety meetings on 2/15/08, 3/3/08, and 6/17/08 in which Grievant's supervisor had discussed Log Book/Pre-Trip inspection in the meetings.⁸

R03750 was the subject of a quality assurance inspection on 6/25/08. This inspection utilized a *District Equipment Quality Assurance Checklist – Dump Truck* form. The first 21 items of the 40 item *District Equipment Quality Assurance Checklist – Dump Truck* were the same 21 items comprising the "Pre-Operational Checklist" required for R03750. Approximately 15 of the 40 items were noted as needing attention and/or being deficient including a number of deficiencies as to the first 21 items (which also compromised the "Pre-Operational Checklist").⁹

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code Section 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code Section 2.2-3000(A) sets forth the Virginia grievance procedure and provides, in part:

"It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under Section 2.2-3001."

To establish procedures on standards of conduct and performance for employees of the Commonwealth of Virginia and pursuant to Section 2.2-1201 of the Code of Virginia, the Department of Human Resources Management promulgated the *Standards of Conduct*, Policy No. 1.60. The *Standards of Conduct* provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The *Standards of Conduct* serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Unacceptable behavior is divided into three types of offenses, according to their severity.

⁷ Testimony and Agency Exhibit Tab 9

⁸ Agency Exhibit Tab 7.

⁹ Agency Exhibit Tab 4.

Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Suspension of up to 10 workdays for the first Group II Offense is provided. A second active Group II Notice should result in termination."¹⁰ Failure to follow a supervisor's instructions or comply with written policy is an example of a Group II offense.¹¹

Agency written policy provides as follows:

VIRGINIA DEPARTMENT OF TRANSPORTATION, MAINTENANCE DIVISION,
MEMORANDUM, No. 5.00

POSITIONS: OPERATORS

TASKS: Perform operators checklist tasks as specified on the appropriate operator checklist generated from the Equipment management System. A log book shall be maintained in each unit of CDL equipment. Inspection forms and other required documents shall be maintained in the log book. Submit completed documents of inspection with noted deficiencies/problems to supervisors upon completion of inspection tasks. Correct minor deficiencies (i.e., replace light bulbs, top-off fluids) and perform daily/weekly lubrication per manufacturer's recommendation.¹²

Grievant was employed by Agency as an equipment operator and crew member and he had a Class "A" Commercial Drivers License (C.D.L.) at all times relevant to this cause.

Agency vehicle, R03750, was a dump truck and its operator was required to have a C.D.L. On 6/23/08 Grievant was assigned to this vehicle and operated this vehicle. The log book was not signed indicating a pre-trip/pre-operation inspection was conducted by Grievant.

Grievant has received training from Agency on the requirements as to maintaining Log Books and as to conducting pre-trip/pre-operation inspections. As part of the licensing procedure to get his C.D.L. from the Department of Motor Vehicles Grievant was required to do a pre-trip walk around inspection. His supervisor has also instructed him to conduct a pre-trip inspection and to sign the log book when operating vehicles required to be operated by persons with a C.D.L. Agency written policy requires a pre-trip inspection and that there be a signed log book also when operating a vehicle that requires a C.D.L. of its operator.¹³

On 6/25/08 a Quality Assurance Inspection was conducted concerning R03750 which turned up a number of deficiencies. The vehicle inspection of 6/25/08 indicated that the Last Operator Daily Inspection date was 6/20/08 (from Log Book Green Sheet). The 6/25/08 inspection found approximately 15 items as needing attention and/or being deficient on this vehicle. The items needing attention and/or being deficient include:

RIGHT SIDE HEADLIGHT OUT, LOW AND HIGH BEAM, CAB ROOF LENSES CRACKED, NO CAB LIGHT, STROBE INOP,
FRONT PLOW COUPLERS LEAKING,
TRAILER COUPLER NEEDS TO BE UPDATED TO PROPER SIZE,

¹⁰ Agency Exhibit Tab 1, Section B.2.b. Policy No. 1.60, "Standards of Conduct" Effective Date: April, 16, 2008.

¹¹ Policy No. 1.60, Effective Date: April, 16, 2008 "Standards of Conduct - Attachment A."

¹² Agency Exhibits, Tab 2, pg. 19.

¹³ Testimony and Agency Exhibit Tab. 2 pg. 19.

NEEDS WIPER BLADES,
WIRING AT REAR OF TRUCK NEEDS TO BE REPLACED (UNAPPROVED CONNECTORS,
CORRODED WIRE, BROKEN WIRE, TRAILER PLUG CORRODED)
BACK UP LIGHT INOP,
DUMP MOUNT BOLTS LOOSE AT REAR HINGE & REAR SIDES,
TRANS LEAKING FROM REAR,
REPLACE ___ BELT AND A.C. BELT,
CHECK ALL BRAKES FRONT UPPER SHOES WEARING FASTER THAN LOWER, REAR
BACKING PLATES RUSTED THROUGH,
OIL LEAK AT AIR PUMP,
OIL AND TRANS LEVELS LOW,
TIGHTEN ALL SUBFRAME BOLTS, SUBFRAME CRACKED RIGHT & LEFT SIDE,
ENGINE MAKING A TAPPING NOISE AT IDLE GETS LOWER AS IT WARMS UP,
LR INSIDE VALVE CORE LEAKING WHEN CAP IS REMOVED,
BLOWER FAN INOP ON LOW & MED.¹⁴

When the Agency received the results of the 6/25/08 Quality Assurance Inspection they conducted their own investigation of matters. Part of the Agency's investigation was to determine when the dump truck, R03750, was last used and who the last operator was prior to 6/25/08. The Agency investigation determined that R03750 was last used by Grievant and the last time it was used prior to 6/25/08 was on 6/23/08. The daily work schedules indicated that on 6/24/08 and 6/25/08 R03750 was not operated on these dates.

The Agency was concerned that the Quality Assurance Inspection found a number of safety deficiencies that should have been and would have been found in a pre-trip inspection. The pre-trip/pre-operation checklist has 21 items of inspection and these same 21 items appear as the first 21 of the 40 items in the Quality Assurance Inspection. These 21 items contained deficiencies relating to the safety of the operation of the vehicle. Concern was that the deficiencies were determined by a Quality Assurance Inspection on 6/25/08 and not discovered and corrected prior to operation the dump truck on 6/23/08.

The Agency determined that Grievant drove R03750 on 6/23/08. He was assigned that truck at the start of shift and was assigned to cleaning up downed trees.¹⁵ The Agency further determined that he had not conducted the pre-trip/pre-operation inspection and had not filled in and signed the "Pre-Operation Vehicle Inspection Form" indicating the date of inspection and if deficiencies were found or not. Grievant's supervisor had instructed him and written policy had also required him to conduct the pre-operation inspection and fill out the log under these circumstance.

Grievant argues that policy was not fairly and equally applied and that Agency has inconsistently applied disciplinary action. He raised the contention that supervisors did not follow procedures and were treated differently. The Hearing Officer finds these arguments and the evidence unpersuasive. Grievant argued that Supervisor did not sign the "Monthly Supervisor Review" for the Log Book and Supervisor was not disciplined. The "Monthly Supervisor Review" form itself indicated there were months in which the Review was not signed

¹⁴ Agency Exhibits, Tab 2 pg. 8-9; Agency Exhibits, Tab. 4.

¹⁵ Agency Exhibit, Tab 3 and Testimony.

by anyone, months where Supervisor signed, and months in which individuals other than Supervisor signed the form. Grievant presented testimony of witnesses and the form confirmed this. Testimony also indicated that vehicles were and are moved from one area to another area. Testimony at hearing indicated that, from the evidence presented, it was not known if the vehicle in question was in Supervisor's area for the months he did not sign the review or if the vehicle was in another area. Being or not being in the supervisor's area would affect the obligation of the particular supervisor to sign the review.

Agency is in the process conducting an investigation as to the allegations raised concerning Supervisor and signing of the "Monthly Supervisor Review". Agency indicated that it has had three prior incidents that occurred within the residency of operators not signing log books and/or conducting pre-operation inspections. Each of the individuals received a Group II Written Notice with one of the individuals also receiving a two day suspension.¹⁶

Grievant, in questioning and argument, contends that an emergency situation existed which negated the requirement of a pre-trip inspection and/or log book being maintained. However testimony indicated that an emergency must be declared by the resident administrator or the governor and this was not declared for 6/23/08.

The Agency took into consideration safety issues, the number of times Agency had conducted safety meetings, number of times the employees were instructed to sign the log books, and written policy. The Agency was concerned that the deficiencies could and most likely would have been found in a pre-operation inspection. These deficiencies include safety issues related to the strobe light (which is used when at the work site and when towing) being inoperable, right side headlight being out, and back up light inoperable. Additional maintenance concerns included oil and transmission levels being low, the need to replace belts and wiring, and washer blades. Testimony indicated a pre-trip inspection takes less than 15 minutes and doing the inspection is stressed by Agency for safety concerns. In deciding to give Grievant a Group II Agency took into consideration these safety concerns and Agency responsibility and liability if there were to be an accident.

Grievant challenges records indicating vehicle assignments. Grievant presented evidence which he contends indicates that the vehicle assigned to an individual was not necessarily the vehicle that person drove. The Agency does not contest that the initially assigned operator who is tasked with taking out the vehicle may, at times, be different than the driver who returns the vehicle or who is instructed to later drive the vehicle. The vehicle assigned and taken out at the start of a shift may later be driven by another individual. However, testimony indicated that it is the policy of Agency that if a vehicle is assigned to an individual at the start of the shift, then that person is the person responsible for the pre-trip/pre-operation inspection and log entries, even if someone else is later assigned to drive or bring the vehicle back from a work site.

The evidence indicates Grievant was assigned to R03750 on 6/23/08 and operated the vehicle without conducting a pre-operation inspection and/or not signing and maintaining the log book as instructed. There was no documentation of a pre-trip inspection as required. The log

¹⁶ Testimony.

book was not signed and filled in indicating if there were deficiencies noted or not as required.

A Group II Offense provides for suspension options of up to 10 workdays for the first Group II Offense. Grievant was not given any suspension and the Agency elected to issue a Group II Written Notice only in this case.

Upon consideration of the evidence presented and upon consideration of the burden of proof in this cause it is found that the Agency has met its burden. For the reasons stated above, the Agency has proven by a preponderance of the evidence:

- (i.) the employee engaged in the behavior described in the Written Notice;
- (ii.) the behavior constituted misconduct;
- (iii.) the agency's discipline was consistent with law and policy; and
- (iv.) the agency's discipline does not exceed the limits of reasonableness.

The Grievant's actions were such as to warrant disciplinary actions under the Standards of Conduct. The Group II was the appropriate level of disciplinary action for the conduct at issue.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant on July 10, 2008 of a Group II Written Notice is hereby ***UPHELD***.

APPEAL RIGHTS

You may file an Administrative review request within **15 calendar days** from the date the decision was issued.

As the Grievance Procedure Manual sets 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 are the basis for such a request.

2. A challenge that the hearing decision is inconsistent with State or agency policy is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to: Director of the Department of Human Resources Management, 101 N. 14th

Street, 12th Floor, Richmond, Virginia 23219.

3. A challenge that the hearing decision does not comply with grievance procedure is made 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. Requests should be sent to: Director, Department of Employment Dispute Resolution, One Capitol Square, 830 East Main, Suite 400, Richmond, VA 23219.

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 the decision is rendered does not count as one of the 15 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.

Judicial Review of Final Hearing Decision:

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal. You must give a copy of your notice of appeal the Director of the Department of Employment Dispute Resolution.

Lorin A. Costanzo, Hearing Officer