

Issues: Group III Written Notice (failure to follow policy, damaging State property, violating safety rules), and Suspension; Hearing Date: 11/17/10; Decision Issued: 12/30/10; Agency: DMME; AHO: Sondra K. Alan, Esq.; Case No. 9391; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 01/13/11; Outcome pending;** **Administrative Review: EDR Ruling Request received 01/13/11; Outcome pending;** **Administrative Review: DHRM Ruling Request received 01/13/11; Outcome pending.**

DECISION OF HEARING OFFICER
IN RE: CASE NO. 9391
HEARING DATE: November 17, 2010
DECISION ISSUED: December 30, 2010

PROCEDURAL HISTORY

Grievant was issued a Group III Written Notice. Although the Notice was not dated, it was signed by Grievant on June 16, 2010. Grievant was disciplined for not following accident notification policy, willingly and recklessly damaging state property and violating safety rules. This Group III Written Notice included a ten (10) day suspension without pay, a twenty (20) day suspension of driving privileges and a requirement to attend a safe driving class. The incident in question occurred March 15, 2010. There was an investigation conducted on June 2, 2010 and a recommendation issued on June 12, 2010.

The Grievant was dissatisfied with the outcome of the First and Second Step Resolutions and after the second step decision of June 24, 2010, Grievant requested an expedited hearing.

The matter was scheduled for hearing during a pre-hearing telephone conference on August 23, 2010 at 11:00 am, and after several reschedulings requested by the parties, the case was set for hearing on November 17, 2010 at 10:00 am at the Agency's facility.

As the hearing commenced, Grievant's advocate presented a Motion that Grievant's due process had been denied and the Grievance policy not followed.¹ Agency's advocate did not object to the timeliness of the Motion. Agency's advocate made a reply statement. The Motion was taken under advisement and the hearing proceeded.

APPEARANCES

Agency Advocate
Agency party representative (witness)
2 Witnesses for Agency
Grievant Advocate
Grievant (witness)
1 Witness for Grievant

¹ DHMR, Standard of Conduct Policy No. 1.60 revised 4-16-2008

ISSUES

1. Whether Grievant was afforded due process?
2. Whether actions taken in issuing Grievant's written Notice followed written policy?
3. Whether Grievant failed to file an accident report as per policy?
4. Whether Grievant willfully or recklessly damaged state property?
5. Whether Grievant violated safety rules?

BURDEN OF PROOF

In disciplinary actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were 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 is to be proved is more probable than not. GPM § 9. It is incumbent on Grievant to show that the relief sought by Grievant is applicable to Grievant's case. GPM §5.9(a). Also, Grievant has the burden of proving any affirmative defenses raised by Grievant. GPM §4.1(b).

APPLICABLE LAW AND POLICY

The General Assembly enacted the Virginia Personnel Act, VA. Code §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. Code of Virginia, §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 and 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 §2.2-3001."

To establish procedures on Standards of Conduct and Performance for employees pursuant to §2.2-1201 of the Code of Virginia, the Department of Human Resource Management ("DHRM") promulgated the *Standards of Conduct, Policy No. 1.60, effective April 16, 2008*. 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.

Section B. 2. of Policy NO. 1.60. "Standards of Conduct" effective April 16, 2008, provides, "To assist management in the assessment of the appropriate correction action, offenses are organized into three groups according to the severity of the misconduct or behavior." The *Standards of Conduct* also provides that the listed examples of offenses are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted.

Section E. 1. of Policy NO. 1.60. "Standards of Conduct" effective April 16, 2008, provides, "Advance Notice of Discipline to Employees-Prior to the Issuance of Written Notices, disciplinary suspensions, demotions, transfers with disciplinary salary actions and terminations employees must be given oral or written notification of the offense, an explanation of the Agency's evidence in support of the charge and a reasonable opportunity to respond."

FINDING OF FACTS

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

Grievant is a gas and oil inspector for the Department of Mines, Minerals and Energy. He has held this particular position for approximately twenty (20) years. He estimated he has traveled over one-half (1/2) million miles in this capacity of inspecting gas and oil systems.

Gas wells in Virginia are rated for their urgency to be inspected according to State guidelines. After initial start-up is completed and monitored, it is not uncommon for an established well to be inspected once a year. Inspectors have schedules to follow to view the sites within their district. The locations are often remote with only service road access. Forging streams where no bridge exists is not uncommon. The particular two (2) sites in question (March 15, 2020) were scheduled to be inspected within one year of December 18, 2008. Grievant made an attempt in both December 2009 and January 2010 to access the location of the wells but, due to weather, he was unable to reach them. No attempt was made in February. On March 15, 2010, Grievant again revisited the road to the well locations. There were three (3) locations on the service road where streams covered the road. Grievant stated he inspected the first stream, using his expertise of twenty (20) years and determined he could ford it. He stated he applied the same determination to the second and third crossings. Grievant misjudged the depth of the water near the exit point of the third stream and his state owned vehicle stalled and became entrapped in the stream. Water did wash into the vehicle and the lower parts of the engine. The water height was higher than the bottom of the door of the vehicle.

Grievant left the vehicle by climbing out the passenger side window and onto the bank. Grievant's cell phone had no service. Grievant determined to walk uphill hoping to get cell service. He did pass both wells sites on his journey uphill. When he was still unable to get service, he turned to travel back to the highway. He forded all three (3) streams on foot in mid-March to arrive back to "civilization". He convinced an occupant of a home to allow him to use her phone to call for help. The incident occurred

approximately 1:30 pm and Grievant's call from the lady's home was at approximately 4:00 pm. The vehicle was not pulled from the water until after dark. By this time, there was considerable water damage. Agency estimated the loss of the vehicle at \$9,050.00² and replacement cost at \$26,800.00 or a total economic loss of approximately \$36,000.00.³

Agency conducted an investigation of the incident.⁴ Grievant was called upon to give factual information. At the conclusion of the investigation, it was determined to issue a Group III Disciplinary Notice to Grievant with a ten (10) day suspension without pay, a twenty (20) day suspension of driving privileges and a requirement to attend a safe driving class.

DISCUSSION

Agency presented evidence to show Grievant had not been truthful about the event by filing his inspection report twenty-four (24) hours later (March 16) and moving the inspection frequency up to six (6) months. Agency believed that Grievant had stated to the investigator that he had inspected the wells when he had passed them on his climb uphill seeking phone service. Grievant stated he did view the wells but did not inspect them and that since the December 2009 inspection date had not been accomplished, the well should be revisited no later than June of 2011.

Agency stated Grievant was to have reported the incident to the State Police for investigation.⁵ Office of Fleet Management Service Policies and Procedures Manual, Section IV(A) clearly states any accident is to be reported. Grievant stated he did not realize that there would be damage to the vehicle, such that a report would need to be filed and, further, Grievant checked with his superior and they both did not recognize a need to contact the police. The written policy was clear and Grievant was expected to have read it.

Agency also found that Grievant had violated safety rules by endangering himself and the vehicle. However, it was admitted by Agency's witnesses that there were no written safety rules.⁶ This would make it very difficult for Grievant to fail to follow a policy if there was not one.

Agency believed Grievant had willfully and recklessly driven the state owned vehicle into a dangerous stream. Grievant had a very long history of visual evaluation of streams and had proven himself not accident prone, having had very few incidences in his twenty (20) years of service. The Agency gave no evidence of a standard policy for evaluating streams. Surely, Grievant was not expected to walk through icy waters in bare feet to check the depth. Grievant stated he visually checked the route and he determined it was safe based on his twenty (20) years experience of fording streams. There is no

² Agency Exhibit F

³ Agency Exhibit A, Accident Review Report

⁴ Agency Exhibit A, Accident Review Report

⁵ Agency Exhibit H, part IV (A)

⁶ Testimony of Agency's first witness

preponderance of evidence to believe this is not true. Further, there is no reason to believe Grievant's survey of the stream was a reckless or willful intent to damage state property.

The Agency's case is motivated by the extraordinary cost of the accident and hindsight knowledge. Grievant would certainly not have crossed the stream if he had had "after the fact" knowledge "before the fact". If Agency cannot trust employee's judgment then to reduce the possibility of this sort of accident and to hold employees responsible, inspectors should be provided with waders and a yardstick and a safe water level established. All stream crossings should have a walk-through check. Holding Grievant responsible for the cause based solely on the evidence of the effect does not meet the Agency's burden of proof.

Grievant contends the Agency did not follow written policy or afford him his due process rights by not permitting him an opportunity to discuss a forthcoming discipline before it was issued. There is no lack of due process by not permitting a defense before being charged. Grievant's opportunity to defend himself would not be necessary until after he was aware that he needed to defend himself. Grievant had ample opportunity to do this in the grievance steps provided by law. However, as a breach of policy, Agency makes it clear Grievant was expected to follow the policies of DHRM Policy 1.60.⁷ There is no reason why Agency should not also follow the policies as clearly written.⁸

OPINION

I find Agency has failed to prove Grievant's actions were willful and reckless. I find Grievant did not violate a non-existent safety policy. I do find Grievant failed to follow the accident reporting policy.⁹ I find a Group III Disciplinary Action excessive for a first offense of failure to report an accident.

Further, I find Grievant's due process rights were not violated as Grievant had ample opportunity to defend himself through the grievance process. DHRM Policy clearly states Grievant should have an opportunity to discuss a written notice (not just appear at the investigative stage) prior to its being issued.

DECISION

For the reasons stated above, I find that Agency's discipline of Grievant with a Group III discipline too harsh and would reduce it to a Group I for failure to follow an accident reporting policy.

However, I find that Agency did not follow policy in the manner in which Agency issued the Written Notice. Grievant's Motion is granted. The matter is **dismissed**.

⁷ DHRM, Section B. 2. of Policy NO. 1.60

⁸ DHRM, Section E. 1. of Policy NO. 1.60

⁹ Agency Exhibit H, part IV (A)

Grievant shall be awarded back pay and the Group III Disciplinary Action removed. Grievant did not make a request for attorney fees and they are not granted.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review.¹⁰ Once the administrative review phase has concluded, the hearing becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three (3) 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 policy or a challenge that the hearing decision is inconsistent with state policy 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, Department of Human Resources Management
101 N. 14th Street, 12th Floor
Richmond, VA 23219

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of the 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
600 East Main Street, Suite 301
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 original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with issuance of the decision, not receipt of the decision.)

¹⁰ 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.

However, the date the decision is rendered does not count as one of the 15 days following the issuance of the decision). 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 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 grievance arose.¹¹ You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution. The Agency shall request and receive prior approval of the Director before filing a notice of appeal.

Sondra K. Alan, Hearing Officer

¹¹ An appeal to Circuit Court may be only on the basis that the decision was contradictory to law, and must identify the specific Constitutional provision, statute, regulation or judicial hearing that the Hearing Decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E. 2d 319 (2002).